NO. FBT CV 15 6048103 S	**:**	**SUPERIOR COURT**
DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL	**:**	**JUDICIAL DISTRICT OF FAIRFIELD**
V.	**:**	**AT BRIDGEPORT**
BUSHMASTER FIREARMS INTERNATIONAL, LLC, a/k/a, ET AL	**:**	**MAY 27, 2016**

PLAINTIFFS' OMNIBUS OBJECTION TO DEFENDANTS' MOTIONS TO STRIKE

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I. INTRODUCTION

Plaintiffs brought this action because defendants bear legal responsibility for the carnage at Sandy Hook Elementary School on December 14, 2012. Defendants chose to sell a military weapon to the civilian market, ignoring the unreasonable and demonstrated risk that its assaultive capabilities would be used against innocent civilians. In making that sale, defendants violated the common law of negligent entrustment and the Connecticut Unfair Trade Practices Act ("CUTPA"), two causes of action that Congress expressly preserved in the Protection of Lawful Commerce in Arms Act ("PLCAA").

Defendants attempt to shirk their legal responsibility by distorting the text of PLCAA to suit their purposes. Confronted with provisions of PLCAA that clearly authorize plaintiffs' causes of action, defendants resort to rewriting the statute to confer complete immunity from plaintiffs' claims. But their interpretations are contrary to PLCAA's plain meaning and find no support in case law. The Court should deny defendants' motions.[1]

II. LEGAL STANDARD

A motion to strike challenges a complaint on the grounds that it fails to state a claim for which relief can be granted. *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498 (2003). In deciding the motion, the court must "construe the complaint in the manner most favorable to sustaining its legal sufficiency." *Vacco v. Microsoft Corp.*, 260 Conn. 59, 65 (2002). Accordingly, "all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted . . . [and] pleadings must be construed broadly and realistically,

[1] Plaintiffs file this Omnibus Objection in response to the motions and memoranda filed by all defendants, Docket Nos. 148-153. Because the Riverview Defendants largely adopted the other defendants' arguments, we cite only to the memoranda filed by the Remington and Camfour Defendants.

rather than narrowly and technically." *Gazo v. City of Stamford*, 255 Conn. 245, 260 (2001). "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." *American Progressive Life & Health Ins. Co. of New York v. Better Benefits, LLC*, 292 Conn. 111, 120 (2009).

The movant may not supplement the record by arguing or assuming facts not alleged in the challenged complaint. *Mercer v. Cosley*, 110 Conn. App. 283, 292 n.7 (2008) ("A speaking motion to strike is one improperly importing facts from outside the pleadings. Speaking motions have long been forbidden by our practice."); *Liljedahl Bros., Inc. v. Grigsby*, 215 Conn. 345, 348 (1990) ("Where the legal grounds for [a motion to strike] are dependent upon underlying facts not alleged in the plaintiff's pleadings, the defendant must await the evidence which may be adduced at trial, and the motion should be denied.")

Nor can the movant use a motion to strike to obtain a more definite or detailed statement of facts, especially when no request to revise was filed. Prac. Bk. §§ 10-35, 10-38. "[T]he proper motion to challenge a failure to plead facts is a request to revise and not a motion to strike." *Salzano v. Goulet*, 2005 WL 2502701, at *1 (Conn. Super. Sept. 22, 2005) (Shluger, J.); *Poseidon Group, Inc. v. Bridgeport Hosp.*, 2004 WL 2591963, at *1 (Conn. Super. Oct. 6, 2004) (Levin, J.) ("[I]f the plaintiff desired a fuller factual statement of the defense, it should have filed a request to revise."); *see also Parsons v. United Technol. Corp*, 243 Conn. 66, 100 (1997) (Berdon, J., concurring and dissenting) ("The defendant, in order to protect itself from broad based allegations, need only file a request to revise . . . to compel the plaintiff to amend his pleading for 'a more complete or particular statement of the allegations.'").

Finally, under this "broad, flexible, and permissive" standard, the presence of mixed questions of law and fact cautions against dismissal. *Macomber v. Travelers Property & Cas.*

Corp, 261 Conn. 620, 629 (2002); *id.* at 636 ("questions of mixed fact and law…require[d] a more detailed factual matrix than [was] disclosed by the plaintiffs' allegations" and thus could not "be answered satisfactorily on [a] motion to strike"). This caution reflects Connecticut's long-standing rule that claims sounding in negligence, which are generally fact-intensive, should rarely be determined prior to trial. *E.g.*, *Spencer v. Good Earth Restaurant Corp.*, 164 Conn. 194, 199 (1972) ("Issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner."); *Gutierrez v. Thorne,* 13 Conn. App. 493, 501 (1988) (reversing grant of summary judgment, despite uncontested facts, because the inference of foreseeability was property left to the jury); *Bendowski v. Quinnipiac College*, 1996 WL 219532, at **3-5 (Conn. Super. Apr. 8, 1996) (Silbert, J.) (denying motion to strike despite ambiguity surrounding the defendant's duty to plaintiff and the lack of any Connecticut case "that directly addresses the factual situation presented by this case" because "in negligence cases such as this, which are highly fact[-]dependent, the striking of complaints, like the granting of summary judgment, is disfavored").[2]

III. FACTUAL BACKGROUND

This action arises out of the shooting at Sandy Hook Elementary School on December 14, 2012 that killed twenty first-grade children and six educators and wounded two others. Plaintiffs are ten families whose lives were shattered that day: nine plaintiffs lost a child or spouse, and

[2] This same caution applies to CUTPA claims: "whether a defendant's acts constitute fraudulent misrepresentation, or deceptive or unfair trade practices under CUTPA, is a question of fact for the trier [of fact]." *Tallmadge Bros., Inc. v. Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 505 (2000); *see also DiTomaso v. Shorehaven Golf Club, Inc.*, 2003 WL 21299609, at *3 (Conn. Super. May 23, 2003) (Lewis, J.) (denying motion to strike, despite factual brevity of allegations, on grounds that "it is not for this court to decide on a motion to strike whether the defendants' alleged acts were unfair or deceptive").

the tenth was shot multiple times but survived. *See* First Amended Complaint ("FAC") ¶¶ 37-46; *see also* ¶¶ 191-205.

Plaintiffs allege that the AR-15 rifle used in the shooting – a Bushmaster XM15-E2S – is not an ordinary weapon. The AR-15 was conceived out of the exigencies of modern conflict, as trench warfare gave way to close-range, highly mobile combat. *Id.* ¶¶ 48-50. After World War II, the U.S. Army's Operations Research Office analyzed more than three million casualty reports in their pursuit of the ideal combat weapon. *Id.* Their findings led the Army to develop specifications for a new service weapon: a lightweight rifle that would hold a large detachable magazine and rapidly expel ammunition with enough velocity to penetrate body armor and steel helmets. *Id.* ¶¶ 48-49. The AR-15 delivered; lightweight, air-cooled, gas-operated, and magazine-fed, the AR-15's capacity for rapid fire with limited recoil meant its lethality was not dependent on good aim or ideal combat conditions. *Id.* ¶ 50. Troops field-testing the weapon reported instantaneous deaths, as well as amputations, decapitations, and massive body wounds. *Id.* ¶ 51. The military ultimately adopted the AR-15 as its standard-issue service rifle, renaming it the M16. *Id.*

As an AR-15, the Bushmaster XM15-E2S is built for mass casualty assaults. Semiautomatic fire unleashes a torrent of bullets in a matter of seconds; large-capacity magazines allow for prolonged assaults; and powerful muzzle velocity makes each hit catastrophic. *Id.* ¶¶ 56-75. The combined effect of these mechanical features is more wounds, of greater severity, in more victims, in less time. *Id.* ¶¶ 72-73. This superior capacity for lethality – above and beyond other semiautomatic weapons – is why the AR-15 has endured as the U.S. military's weapon of choice for more than 50 years. *Id.* ¶ 74.

Indeed, the XM15-E2S's lethal efficiency is ideal for highly regulated institutions that require assaultive weaponry. When the AR-15 is sold to the military – and more recently, to law enforcement – it enters an environment where its devastating lethality is both justified and strictly controlled through protocols governing training, storage, safety, and the mental health of soldiers and officers. *Id.* ¶¶ 116-43. When defendants made the Bushmaster XM15-E2S available to the general public, however, they knowingly placed the same weapon into a very different environment: one where the weapon's utility for legitimate civilian purposes is scant, firearms are shared freely among family members, and oversight is virtually nonexistent, *id.* ¶¶ 144-66; where marketing extols the weapon for its "military-proven performance" that will make "forces of opposition bow down," *id.* ¶¶ 75-92; and where a litany of mass shootings have made two things harrowingly clear – the AR-15 is the weapon of choice for shooters looking to inflict maximum casualties, and American schools are on the frontlines of such violence, *id.* ¶¶ 167-170.

Defendants nevertheless sold the Bushmaster XM15-E2S as a civilian weapon, with negligent disregard for the obvious and unreasonable risks associated with that sale. The Remington Defendants sold the XM15-E2S to the Camfour Defendants, who in turn sold it to the Riverview Defendants; the purpose of both transactions was the re-sale of the weapon to the civilian market. *See id.* ¶¶ 176-78; *id.* Count I ¶ 223; *id.* Count II ¶ 223. In March of 2010, the Riverview Defendants sold the Bushmaster XM15-E2S to Nancy Lanza. *Id.* ¶ 182.

Plaintiffs allege that Nancy Lanza purchased the Bushmaster XM15-E2S to give to or share with her son, Adam Lanza – a devoted player of first-person shooter games who was captivated by the military. *Id.* ¶¶183-85. When Adam turned eighteen on April 22, 2010, he did

not enlist; instead, he gained unfettered access to the military-style assault rifle his mother had purchased twelve days before. *Id.* ¶ 186.

On the morning of December 14, 2012, Adam Lanza selected the weaponry he would use in his assault on Sandy Hook Elementary School. Available options included, in addition to the Bushmaster XM15-E2S, at least one shotgun, two bolt-action rifles (one of which he used to kill his mother), three handguns (one of which he used to kill himself), and three samurai swords. *Id.* ¶ 188. From this extensive arsenal, Adam Lanza selected the Bushmaster XM15-E2S. His choice was anything but random; plaintiffs allege that Adam Lanza chose the Bushmaster XM15-E2S for its assaultive qualities, in particular its efficiency in inflicting mass casualties, as well as for its marketed association with military combat. *Id.* ¶¶ 189-90.

Just after 9:30 a.m., Adam Lanza shot his way into Sandy Hook Elementary School, armed with the Bushmaster XM15-E2S and ten 30-round magazines – several of which he had taped together to allow for faster reload. *Id.* ¶ 187. It was the weapon he would use to take 26 lives in under five minutes. Mary Sherlach, a child psychologist, was in a meeting with the school's principal when the first shots were fired; when they went to investigate, both were killed with the Bushmaster XM15-E2S. *Id.* ¶ 202. Lead teacher Natalie Hammond and another staff member were shot with the Bushmaster XM15-E2S and wounded. *Id.*

Adam Lanza then approached two first-grade classrooms, Classroom 8 and Classroom 10. In Classroom 8, Adam Lanza used the Bushmaster XM15-E2S to kill 15 children and 2 adults, including seven-year-old Daniel Barden, six-year-olds Benjamin Wheeler and Noah Pozner, 29-year-old behavioral therapist Rachel D'Avino, and 30-year-old substitute teacher Lauren Rousseau. *Id.* ¶ 204. In Classroom 10, Adam Lanza used the Bushmaster XM15-E2S to kill 5 children and 2 adults, including Dylan Hockley and Jesse Lewis, both six years old, and

their 27-year-old teacher Victoria Soto. *Id.* ¶ 205. Nine children from Classroom 10 were able to escape when Adam Lanza paused to reload the Bushmaster XM15-E2S with another 30-round magazine. *Id.* ¶ 206.

The first 9-1-1 call from Sandy Hook Elementary School was made at 9:35 a.m.; by 9:40 a.m., the assault was complete. *Id.* ¶ 207. In the span of those five minutes, 154 bullets were expelled from the Bushmaster XM15-E2S. *Id.* ¶ 212.

Based on these and additional allegations, plaintiffs assert claims of negligent entrustment and violation of CUTPA against the entities that marketed and sold the Bushmaster XM15-E2S rifle used in the shooting: the Remington Defendants, the Camfour Defendants, and the Riverview Defendants. On October 29, 2015, plaintiffs filed their First Amended Complaint, which is the operative complaint for purposes of the defendants' motions.

IV. PLAINTIFFS STATE NEGLIGENT ENTRUSTMENT CLAIMS

In Connecticut, entrusting a dangerous instrument to another gives rise to a duty to guard against the use of that instrument to cause harm – even if the harm results from a criminal act. Simple as that concept it, it is deeply fact-intensive; it implicates, among other things, the dangerousness of the item being entrusted; the propensities of certain classes of persons; and inferences about how people are likely to behave under certain sets of circumstances. The extent of an entrustor's knowledge, and the resulting scope of foreseeable harm, are questions that belong to a jury.

Defendants implicitly acknowledge this by largely ignoring the common law of negligent entrustment. In an effort to transform factual issues into legal ones, they assert that PLCAA forecloses plaintiffs' claims entirely. In doing so, they ignore the statute's plain meaning and

advance untenably narrow interpretations of the words "use" and "seller." These arguments must be rejected.

A. Plaintiffs State Negligent Entrustment Claims under Connecticut Common Law

Under Connecticut law, those who entrust a dangerous instrument to another must do so prudently. This duty is defined by Section 390 of the Restatement (Second) of Torts, which imposes liability on one who "supplies . . . a chattel for the use of another whom the supplier knows or has reason to know to be likely . . . to use it in a manner involving unreasonable risk of physical harm to himself and others." Restatement (Second) of Torts § 390 (1965). The Connecticut Supreme Court adopted Section 390's definition of negligent entrustment in 1933. *See Greeley v. Cunningham*, 116 Conn. 515, 165 A. 678 (1933) (reciting elements of § 390); *Short v. Ross*, 2013 WL 1111820, at *5 (Conn. Super. Feb. 26, 2013) (Wilson, J.) ("[A]s long recognized by the decisions of the Superior Court, *Greeley* 'virtually adopted' the approach provided by the Restatement.").

The doctrine of negligent entrustment takes the world as it is, not as it should be. It assigns liability "based upon the rule . . . that the actor may not assume that human beings will conduct themselves properly if the facts which are known or should be known to him should make him realize that they are unlikely to do so." Rest. (Second) § 390 cmt. b. A defendant's knowledge about how "human beings will conduct themselves" – which determines the scope of foreseeable harm – is thus at the crux of any negligent entrustment claim and ultimately a question for the trier of fact.

Connecticut case law recognizes that unreasonable harm posed by an entrustee's use of a chattel may become foreseeable to the entrustor in at least three distinct ways. First, the entrustee's prior behavior may evidence a personal propensity to misuse the chattel. For

example, where an owner entrusts her car to another, the victim of a subsequent collision may claim that the entrustment was negligent because the owner knew, or should have known, that the entrustee's past behavior created a heightened risk of unsafe driving. *E.g.*, *Morin v. Keddy*, 1993 WL 451449 (Conn. Super. Oct. 25, 1993) (denying motion to strike where plaintiff alleged designated driver entrusted car to intoxicated friend).[3]

Second, the entrustee may belong to a class whose members generally share a propensity to misuse the chattel. The comments that accompany Section 390 explain this principle: one who supplies a chattel "is not entitled to assume that the other will use it safely if the supplier knows or has reason to know that such other is likely to use it dangerously, *as where the other belongs to a class which is notoriously incompetent to use the chattel safely*[.]" Rest. (Second) § 390 cmt. B (emphasis supplied). Thus, in *Burbee v. McFarland*, 114 Conn. 56, 157 A. 538 (1931), the Connecticut Supreme Court found a negligent entrustment claim legally viable based solely on the fact that the defendant store had sold fireworks to a twelve-year-old boy, who was injured while setting one off. The Court explained that it was "the business of the dealer to refuse to sell [the child] articles likely to put in jeopardy his own or some other person's life," and it concluded that the dealer may have violated that duty because children as a class, "by reason of youth and inexperience, ... might innocently and ignorantly play with or use [the fireworks] to his injury." 157 A. at 539. Crucially, the Court was not persuaded by the defendant's argument that the particular child at issue was "old enough and sufficiently developed mentally to read and properly understand the instructions printed on the box." *Id.*

[3] The types of cases cited by the Camfour Defendants, *see* Camfour Mem. at 18-19, fall into this category.

Those considerations, although potentially relevant, "involved questions of fact which were properly left to the jury." *Id.*[4]

Third, the entrustee may plan to use the chattel in a particular environment that, for a variety of reasons, augments the risk of harm associated with the chattel. In this scenario, unreasonable risks may be foreseeable even if the entrustee's personal propensities would otherwise not raise concerns about her use of the chattel, and even if the same use would be reasonable in a different context.

Short v. Ross, 2013 WL 1111820 (Conn. Super. Ct. Feb. 26, 2013) (Wilson, J.), illustrates the relevance of such environmental considerations to a negligent entrustment claim. The plaintiff there had, while attending a tailgate, been hit by a vehicle rented from U-Haul. The plaintiff alleged that U-Haul had negligently entrusted the vehicle to its driver – not because the driver was unlicensed, drunk, or had a history of unsafe driving – but because U-Haul knew, or should have known, that the driver planned to use the vehicle at a tailgate. The court deemed those allegations sufficient to state a negligent entrustment claim, emphasizing the dangers attendant to a tailgate environment – including the tendencies of people *other than the entrustee*:

> In the court's estimation, the facts pleaded in the complaint, when fairly read, allege that U-Haul knew or ought reasonably to have known that [the driver] proposed to utilize the truck in an environment where the danger and risk of injury was considerably higher than that typically attendant to the use of a vehicle on the open road. This is because the proposed environment was

[4] Though children are the most obvious example of a class of persons who are unfit to handle dangerous instruments, the logic of the Restatement is not so confined. The commentary to Section 390 speaks to the entrustor's knowledge of the characteristics of the class; it does not impose restrictions on how a class may be defined. *See Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co.*, 328 Ill. App. 3d 482, 488 (2002) ("The plaintiff need not prove that the defendant knew of specific individual propensities for harm; a lawsuit may succeed with proof that the defendant entrusted the dangerous article to a member of a larger class, where the defendant knew or should have known that members of the larger class generally tended to use such articles in a manner involving unreasonable risk of harm.").

> pedestrian-dense, unregulated by the rules of the road and would contain a large number of individuals who had recently consumed alcohol and who would therefore be less capable of exercising their faculties to avoid moving vehicles, and might, in fact, stumble in front of moving vehicles.

Id. at *8. Because of those environmental dangers, U-Haul arguably should have known "that there [was] cause why [the vehicle] ought not to be entrusted to another," *id.* at *7 – even if the renter's driving would have been reasonably safe in a different context.[5]

The absence of safety regulations in a particular environment may also give rise to a foreseeable risk of harm from a chattel's use. Thus, *Short* focused not only on the risks created by the propensities of other tailgaters, but also on the absence of regulations that might meaningfully curb those risks. At a tailgate, the court noted, moving vehicles and pedestrians are "unregulated by the rules of the road." *Id.* at *8.

Short's emphasis on the dearth of safety regulations aligns with how other courts have analyzed claims under Restatement 390. For example, in *Fredericks v. Gen. Motors Corp.*, 48 Mich. App. 580 (1973), the Michigan Court of Appeals concluded that a negligent entrustment claim against General Motors should have survived summary judgment, and therefore remanded for a trial. The claim was premised on General Motors' entrustment of manufacturing dies to a company that allegedly permitted its employees to use the dies "in an unsafe machine hazardous to the operators thereof," without requiring use of "proper and adequate guards and safety devices." *Id.* at 583, 587. In other words, the dies were to be used in a particular environment – the company's workspace – that posed unique and potentially foreseeable dangers because of the

[5] The court clarified that it was not imposing a duty to investigate prospective renters (which Connecticut case law has rejected); rather, under the theory of negligent entrustment liability, U-Haul was subject only to "that general duty imposed by law upon all actors to avoid harm to foreseeable victims." *Id.* at *10.

entrustee's failure to implement appropriate safety regulations. The court remanded so that a jury could decide whether those facts rendered General Motors' entrustment negligent.

And in *Collins v. Arkansas Cement Co.*, 453 F.2d 512 (8th Cir. 1972), the Eighth Circuit affirmed a verdict against a cement manufacturer for negligently entrusting cherry bombs to its employees. The bombs were intended to be used for job-related demolitions at the cement plant, but one of the employees instead gave some of them to a group of children, one of whom was injured. In affirming the verdict, the court concluded that the manufacturer should have foreseen the unreasonable risk that the bombs would be removed from the plant and detonated hazardously. The court premised that conclusion, in part, on the absence of meaningful safety regulations in the plant's environment: It stressed that "[n]o records were kept ... of the bombs issued and no precautions were taken to insure that all of the bombs were used for business purposes or returned to the foreman for safekeeping," leading to "lax control" over "the return of unused bombs." *Id.* at 513-14.

As the foregoing discussion demonstrates, the foreseeability of unreasonable risk in the context of negligent entrustment is a complex and fact-intensive issue. Various related considerations – including the individual propensities of the entrustee, the general propensities of the entrustee's class, the propensities of others in the environment where the entrustee will use the chattel, and the absence of safety regulations in that environment – may be relevant, depending on the nature of the plaintiff's factual allegations. The common law of negligent entrustment thus epitomizes the principle that "'the trier of fact is, in this state, given a wide latitude in drawing the inference of negligence.'" *Kalina v. Kmart Corp.*, 1993 WL 307630, at *5 (Conn. Super. Aug. 5, 1993) (Lager, J.) (quoting *Borsoi v. Sparico*, 141 Conn. 366, 369 (1954)). Consequently, courts are traditionally hesitant to decide issues surrounding knowledge

and foreseeability as a matter of law. *See id.* at *4 (denying defendant K-Mart's motion for summary judgment on negligent entrustment of a firearm claim – even though its sales clerk asked for identification, required purchaser to fill out paperwork required by law, and testified that, in her opinion, the purchaser showed no signs of disability – because "under a theory of negligent entrustment . . . factual questions exist[ed] about what K-Mart knew or should have known that should be resolved by a jury").

Applying that common law here, plaintiffs state a claim for negligent entrustment. The factual allegations in the amended complaint, taken as true, demonstrate that defendants foresaw, or should have foreseen, that their entrustment of the Bushmaster XM15-E2S created an unreasonable risk of harm.

To begin with, as in *Burbee*, there is reason to believe that the chattel is too dangerous to be sold to a particular class of persons: here, that class is defined as non- military and law enforcement because the AR-15 is an assault rifle designed for military combatants and initially sold only to them. *See* FAC ¶¶ 47-74 (Bushmaster XM15-E2S designed for the military and uniquely suited for mass casualty assaults); *compare id.* at ¶¶ 116-43, *with* ¶¶ 144-66 (military and law enforcement's extensive protocols governing safety, storage, and training are not present outside those institutions); *id.* at ¶¶ 105-115 (ATF banned import of weapons like the XM15-E2S because its design serves a function "in combat and crime" but not hunting or sporting); *id.* at ¶¶ 94-104 (XM15-E2S is unnecessary, and may be dangerous, for home defense).

Moreover, plaintiffs have alleged – with great specificity – that the civilian environment into which the Bushmaster XM15-E2S was sold was such that defendants should have appreciated the unreasonable risk of harm to innocent lives created by the sale. This includes defendants' knowledge about how people "conduct themselves" around firearms generally, *see*

id. at ¶ 153-55 (gun owners routinely fail to secure their weapons); awareness that oversight is grossly insufficient, *id.* at ¶¶ 159-64 (ATF's regulation of gun dealers is inadequate), *id.* at ¶¶ 156-58 (transfer of guns among family members is entirely unregulated), *compare id.* at ¶¶ 117, 137, 138, 143 *with* ¶¶ 151 (military and law enforcement assess mental health of users of AR-15s and are empowered to deny access; no such oversight is present among civilians); and knowledge that a particular type of tragedy is associated with civilian use of the AR-15, *see id.* at ¶ 165 (several highly-publicized mass shootings have demonstrated that perpetrators are able to easily acquire AR-15s and that such weapons are the weapon of choice for those looking to inflict maximum casualties), *id.* at ¶¶ 168-70 (prior to Sandy Hook, AR-15s had been used in mass shootings to kill elementary school children, high school children, and college students).

Finally, plaintiffs allege facts that add a troubling dimension to the question of whether a horrific event like the shooting at Sandy Hook Elementary School was foreseeable to the defendants. That is, plaintiffs allege that the Bushmaster XM15-E2S was explicitly marketed as a weapon of war. *See id.* ¶¶ 76-84 (advertising lauds weapon with such phrases as "mission-adaptable," "military-proven performance," "ultimate combat weapons system" and "forces of opposition, bow down – you are single-handedly outnumbered"), ¶¶ 85-86 (weapon is featured in highly realistic and violent first-person shooter games that glorify killing and teach assaultive weapon techniques), ¶¶ 87-92 (XM15-E2S comes with "standard" 30 round magazine, while hunting and competition rifles come with 5 or 10 round magazines).

These allegations give rise to common law claims for negligent entrustment.[6] Defendants clearly disagree; but they also know that Connecticut law provides no basis for converting those

[6] To some extent, defendants suggest that aspects of plaintiffs' claim – including its reference to a class as broad as civilians – depart from common law principles. As demonstrated above, however, plaintiffs' claim is faithful to those principles. The only unprecedented feature of this

factual questions into legal ones. Their solution to this problem is to insist, contrary to every relevant source of law, that PLCAA compels this Court to dismiss plaintiffs' negligent entrustment claims as a matter of law. In fact, PLCAA does the exact opposite: it preserves plaintiffs' right to bring common negligent entrustment claims.

B. PLCAA Preserves Common Law Negligent Entrustment Claims

PLCAA does not sweep nearly as broadly as defendants suggest. The statute defines its primary purpose as follows: "To prohibit causes of action against" firearm manufacturers and sellers "for the harm solely caused by the criminal or unlawful misuse of [a] firearm . . . when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1) (purposes section). As the word "solely" in that statement reflects, PLCAA is a balancing statute; it both limits the exposure of gun companies and preserves the rights of injured parties to seek redress under specified causes of action when those companies share responsibility for a particular harm.

The operative provisions of PLCAA effectuate that balance by preempting a broad category of lawsuits arising from the criminal misuse of firearms, while preserving claims that target wrongdoing in the manufacturing and sale of firearms. Specifically, PLCAA preserves six causes of action, including "an action brought against a seller for negligent entrustment." 15 U.S.C. § 7903(5)(A)(ii). It is important to note that PLCAA does not create a cause of action for negligent entrustment; it simply preserves it. *See* 15 U.S.C. § 7903(5)(C) ("[N]o provision of this chapter shall be construed to create a public or private cause of action or remedy."); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 n.6 (9th Cir. 2009) ("While Congress chose generally to

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lawsuit is the nature and magnitude of defendants' negligent entrustments. They chose to sell a highly lethal military weapon to the public without taking any meaningful precautions. Plaintiffs' claim appropriately applies the common law of negligent entrustment – including its definitions of the relevant class and environment – to the defendants' misconduct.

preempt all common-law claims, it carved out an exception for certain specified common-law claims (negligent entrustment and negligence per se).").

PLCAA preserves common law negligent entrustment, in particular, by codifying the essential elements of Section 390 of the Restatement. Under that section, liability arises when one "supplies" a chattel "for the use of another whom the supplier knows or has reason to know to be likely . . . . to use it in a manner involving unreasonable risk of physical harm to himself and others." Rest. (Second) § 390. PLCAA mirrors that framework within its text: negligent entrustment means "supplying" a firearm "for use by another person when the seller knows, or reasonably should know, the person to whom the [firearm] is supplied is likely to, and does, use the [firearm] in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B).

By borrowing the Restatement's formulation of negligent entrustment, Congress created a framework that both reflects and accommodates state common law. The Restatement is "the most widely accepted distillation of the common law of torts." *Field v. Mans*, 516 U.S. 59, 70 (1995). Moreover, Section 390 is the authoritative source of negligent entrustment law in nearly every state that recognizes the cause of action – including Connecticut. *See W. v. E. Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 555 (Tenn. 2005) ("In line with a majority of other states, this Court has previously cited section 390 with approval in defining negligent entrustment."); *Casebolt v. Cowan*, 829 P.2d 352, 358-59 (Colo. 1992) (collecting cases where states have "employed, approved, or adopted" Section 390); *Short*, 2013 WL 1111820, at *5 (recognizing that the Connecticut Supreme Court adopted the Restatement approach in *Greeley*). The logic of

that choice, of course, flows naturally from Congress' decision not to create causes of action through PLCAA, but merely to preserve certain existing claims.[7]

Thus, PLCAA permits actions that satisfy the common law elements of negligent entrustment to proceed against any defendant that acts as a "seller," as that term is defined in PLCAA. *See* 15 U.S.C. § 7903(5)(A)(ii); *id.* § 7903(6)(B). All three defendants argue that plaintiffs have failed to state a negligent entrustment claim that PLCAA permits. They contend that a firearm can only be "use[d] in a manner involving an unreasonable risk of physical injury" when used to directly cause injury; thus, under this interpretation, neither Camfour, Riverview nor Nancy Lanza "used" the Bushmaster XM15-E2S. The Remington Defendants additionally argue that they are not "sellers" as PLCAA uses the term.

In evaluating these arguments, the Court's analysis must be guided by the plain meaning of PLCAA. "With respect to the construction and application of federal statutes, principles of comity and consistency require us to follow the plain meaning rule for the interpretation of federal statutes because that is the rule of construction utilized by the United States Court of Appeals for the Second Circuit." *Dark-Eyes v. Comm'r of Revenue Servs.*, 276 Conn. 559, 571 (2006). That rule dictates: "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Caputo v.*

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[7] Indeed, state courts frame their understanding of PLCAA's negligent entrustment definition around its similarity to the Restatement and their own state law. *See, e.g.*, *Gilland*, 2011 WL 2479693, at *12 (noting that "[the PLCAA] definition is consistent with Connecticut law on negligent entrustment," which is governed by § 390 of the Restatement); *Estate of Kim v. Coxe*, 295 P.3d 380, 394 & n.89 (Alaska 2013) ("The PLCAA definition is substantially the same as the Restatement version Alaska follows. [Citing § 390 in footnote]"); *see also Al-Salihi v. Gander Mountain, Inc.*, 2013 WL 5310214, at *12 (N.D.N.Y. Sept. 20, 2013) ("The PLCAA standard mirrors the standard for the tort of negligent entrustment under New York law[.][Citing § 390]").

Pfizer, Inc., 267 F.3d 181, 189 (2d Cir. 2001) (quotation marks and citation omitted); *see also Collazos v. United States*, 368 F.3d 190, 196 (2d Cir. 2004) ("Well-established principles of construction dictate that statutory analysis necessarily begins with the 'plain meaning' of a law's text and, absent ambiguity, will generally end there."); *cf. Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). [8]

A plain reading of the statute compels the conclusion that plaintiffs' negligent entrustment allegations are not barred and must be permitted to proceed under Connecticut law.

C. Defendants are "Sellers" under PLCAA

The Camfour and Riverview Defendants acknowledge that they are "sellers" under PLCAA and thus subject to negligent entrustment liability. The Remington Defendants dispute this point, despite the fact that plaintiffs clearly allege it. In doing so, they implicitly ask the Court to disregard its duty to "take the facts to be those alleged in the complaint" and "construe

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[8] Defendants seem to prefer a canon of their own fashioning – that Congress meant what it said when it wrote the purpose section of PLCAA and did not mean what it said when it delineated the scope of permitted causes of action. Throughout their briefs, defendants imply that the underlying policy goals of PLCAA are evidence that plaintiffs' negligent entrustment claims must be dismissed. *See, e.g.*, Remington Mem. at 6 (arguing that "[t]he declared purpose of Congress" set out in the purposes section demonstrates that "PLCAA was enacted to protect firearm manufacturers against the very claims Plaintiffs make in this case"). This is thoroughly circular logic. It is nonsensical to suggest that Congress' intent to bar a certain category of lawsuits is also evidence of its intent to preclude a lawsuit that is *explicitly exempted* from that category. *Cf. Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.") (emphasis in original).

the complaint in the manner most favorable to sustaining its legal sufficiency." *Vacco*, 260 Conn. at 65. The Court need not – and should not – look beyond plaintiffs' allegations. But even if it does, the Remington Defendants' arguments are meritless; they require the Court to read a limitation into PLCAA's text that does not exist, to enforce a strained reading of "seller" that defies common sense, and to rely on a contradictory legislative history that offers no guidance as to legislative intent.

1. Plaintiffs Have Alleged that the Remington Defendants Are Sellers

A "seller" is defined in PLCAA as, among other things, "a dealer . . . who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer[.]" 15 U.S.C. § 7903(6)(B). PLCAA adopts the Gun Control Act's definition of a "dealer," which is "any person engaged in the business of selling firearms at wholesale or retail." 18 U.S.C. § 921(a)(11). PLCAA also incorporates the Gun Control Act's definition of someone "engaged in the business," which reads:

> a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.

18 U.S.C. § 921(a)(21). In other words, a "seller" under PLCAA includes an entity that acts like a dealer – by selling firearms at wholesale or retail as a regular course of business – and is licensed as a dealer under federal law.

Plaintiffs' Complaint makes numerous allegation pertaining to the Remington Defendants' sales activities. *E.g.*, FAC ¶ 97 (at all relevant times, Remington Arms Company, LLC manufactured and sold AR-15s); *id.* at ¶ 171(Remington Defendants sell to wholesalers and

dealers); *id.* at ¶ 171 (Remington Defendants sell directly to prominent chain retail stores); *id.* at ¶ 176 (Remington Defendants sold the Bushmaster XM15-E2S to the Camfour Defendants).

The Remington Defendants ignore these well-pled facts, arguing not only that plaintiffs were required to allege that they were "engaged in the business" under the definition provided by federal law, but that they were "'engaged in the business' as a dealer *with respect to the firearm that was sold and shipped.*" Remington Mem. at 10 (emphasis supplied). As an initial matter, it is lost on plaintiffs how they could allege – much less prove – that Remington was "engaged in the business" of selling the Bushmaster XM15-E2S specifically. By definition, one cannot "devote[] time, attention, and labor to dealing in firearms as a regular course of trade or business" in the course of a single sale. More to the point, this level of specificity is simply not required. It is axiomatic that "[w]hat is necessarily implied [in an allegation] need not be expressly alleged." *Lombard v. Edward J. Peters, Jr., P.C.*, 252 Conn. 623, 626 (2000). It can certainly be inferred from plaintiffs' complaint, reading it "broadly and realistically rather than narrowly and technically," that plaintiffs have alleged that Remington is a "seller" as that term is defined in PLCAA. *Gazo*, 255 Conn. at 260.

Moreover, if the Remington Defendants desired greater specificity in plaintiffs' allegations, they should have followed the proper pleading order dictated by the Practice Book and filed a Request to Revise. *See* Prac. Bk. § 10-35; *Salzano*, 2005 WL 2502701, at *1 ("[T]he proper motion to challenge a failure to plead facts is a request to revise and not a motion to strike."). Having failed to do so, they may not now complain that plaintiffs' factual allegations are insufficient.

The Court should reject the Remington Defendants' argument as to whether they are a seller on this basis alone. Plaintiffs nevertheless respond to each of their arguments below.

2. "Seller" and "Manufacturer" Are Not Mutually Exclusive Terms

Remington counters that it cannot qualify as a seller under PLCAA because it is a manufacturer, and the statutory terms "seller" and "manufacturer" must be construed as mutually exclusive. The statute contains no express language to that effect. Remington therefore argues that its interpretation finds implicit support in a feature of PLCAA's structure – the fact that certain exceptions to the bar on qualified civil liability actions apply to both sellers and manufacturers, while the negligent entrustment exception applies only to sellers. *See* Remington Mem. at 10-11; *e.g.*, 15 U.S.C. § 7903(5)(A)(iii) ("an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product").

This interpretation is utterly unpersuasive. The statute defines "seller" and "manufacturer" by reference to types of conduct and federal licenses that are distinct, but not contradictory.[9] By distinguishing between the two terms, the statute suggests that an entity might be one but not the other; and by permitting negligent entrustment actions only against sellers, it makes clear that such an action must be predicated on a firearm sale, and that only professional firearm sellers are within the statute's scope. *See* 18 U.S.C. § 921(a)(21) (a dealer is "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business . . . [but] shall not include a person who makes occasional sales . . . .").

[9] A seller is someone engaged in the business of selling firearms at wholesale or retail who is licensed as a dealer. *See* 15 U.S.C. § 7903(6)(B); 18 U.S.C. § 921(a)(11). A manufacturer is someone engaged in the business of manufacturing firearms who is licensed as a manufacturer. *See* 15 U.S.C. § 7903(2).

Nothing in PLCAA's language suggests, however, that a single entity cannot be both a seller and a manufacturer.

Indeed, when Congress wishes to preclude overlap between those two categories, it does so explicitly. For example, the National Firearms Act – which PLCAA cites, *see* 15 U.S.C. § 7901(a)(4) – defines a "dealer" as "any person, *not a manufacturer* or importer, engaged in the business of selling, renting, leasing, or loaning firearms[.]" 26 U.S.C. § 5845(k) (emphasis supplied). The absence of any remotely comparable language in PLCAA buttresses the conclusion that the statute does not render sellers and manufacturers mutually exclusive. *See also Broughman v. Carver*, 624 F.3d 670 (4th Cir. 2010) (holding that the terms "dealer" and "manufacturer" in the Gun Control Act of 1968, whose definitions closely mirror those of "seller" and "manufacturer" in PLCAA, are not mutually exclusive).[10]

To embrace the Remington Defendants' interpretation is to accept that Congress intended to draw "untenable distinctions" between entities that sell firearms. *Dark-Eyes*, 276 Conn. at 571. If Congress had defined "seller" to apply only to individuals or entities that sell directly to consumers – such as the Riverview Defendants – Remington's argument that manufacturers are immune from negligent entrustment liability would be more compelling. But Congress did not do that; it gave "seller" a much broader scope, linking it to the Gun Control Act's formulation of "any person engaged in the business of selling firearms at *wholesale* or retail." 18 U.S.C. § 921(a)(11) (emphasis supplied); 15 U.S.C. § 7903(6)(B). In other words, distributors like the

[10] The Remington Defendants' disregard for PLCAA's plain meaning is hard to reconcile with their insistence that the Separation of Powers be respected. *See* Remington Mem. at 5-6. Indeed, "'preference for plain meaning is *based on* the constitutional separation of powers – Congress makes the law and the judiciary interprets it.'" *Mutts v. S. CT State Univ.*, 2006 WL 1806179, at *10 (D. Conn. June 28, 2006) *aff'd* 242 F. App'x 725 (2d Cir. 2007) (quoting *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002)) (emphasis supplied).

Camfour Defendants (who have acknowledged they are sellers under PLCAA) can be liable under a negligent entrustment cause of action for selling firearms in bulk to other dealers. This is precisely what the Remington Defendants do: they sells firearms generally – and AR-15s in particular – to dealers like Camfour, as well as directly to retail stores like Wal-Mart and Dick's Sporting Goods. FAC ¶¶ 171, 172. It is absurd to suggest that the Camfour Defendants can be liable for that conduct but the Remington Defendants cannot, simply because a separate part of Remington's business involves the manufacture of firearms.[11]

3. Remington's Argument That They Are Not "Engaged In The Business" Of Selling Firearms Is Improper

The Remington Defendants claim that they are not "engaged in the business" of selling firearms as that phrase is defined by federal law because they do not engage in the "repetitive purchase and resale of firearms." *See* 18 U.S.C. § 921(a)(21). This argument "speaks," relying on facts not alleged. *See* Remington Mem. at 11 ("When Remington sold the firearm it had manufactured to Camfour, it did not engage in the purchase and resale of the firearm."); *id.* at 10 n.3 ("A licensed manufacturer sells the firearms it manufactures from its premises under its manufacturer license."). "[I]mproperly importing facts from outside the pleadings" is referred to as a "speaking motion to strike" and has "long been forbidden by our practice." *Mercer*, 110 Conn. App. at 292 n.7; *see also Liljedahl Bros.*, 215 Conn. at 348 (where motion to strike is

[11] By the same token, under the Remington Defendants' interpretation, an entity that sells guns can immunize itself from negligent entrustment liability as soon as it makes an additional foray into manufacturing. Suppose that tomorrow the Camfour Defendants begin buying firearm parts and assembling them into custom rifles for sale. Suppose they then obtain a federal manufacturing license to ensure this side business is legally compliant. If the Remington Defendants' reading of PLCAA were correct, such conduct would act as a total shield from liability for negligent sales. This outcome cannot be squared with the directive that "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *Dark-Eyes*, 276 Conn. at 571.

"dependent upon underlying facts not alleged in the plaintiff's pleadings, the defendant must await the evidence which may be adduced at trial, and the motion should be denied.").

In any event, the Remington Defendants fail to mention that courts – including the Second Circuit – have rejected the notion that each element of Section 921(a)(21)(C) must be established to find that a dealer is "engaged in the business." *See United States v. Allah*, 130 F.3d 33, 43 (2d Cir. 1997) (affirming jury charge that defined a firearm dealer "engaged in the business" as a person who "devotes time, attention, or labor to dealing in firearms as a regular course of trade or business for the purpose of a livelihood or profit" and specifically rejecting defendant's argument that the charge was defective because it did not use the exact language of § 921(a)(21)(C)); *United States v. Shan*, 80 F. App'x 31, 31-32 (9th Cir. 2003) ("[Defendant]'s argument rests upon the absence of evidence showing that he profited through the 'repetitive purchase and resale of firearms.' Nevertheless, this Court has previously held that if a person has guns on hand or is ready and able to procure them, that person is engaged in the business of dealing in firearms." (quotation marks and citation omitted)). Under that approach, the Remington Defendants may be "engaged in the business" under Section 921(a)(21)(C) *regardless* of the outcome of discovery on "repetitive purchase and resale."

4. The Court Should Not Consider PLCAA's Legislative History

The Remington Defendants' reliance on legislative history to interpret the meaning of "seller" is inappropriate. *See* Remington Mem. at 12-13. PLCAA's legislative history is notoriously unreliable,[12] and the self-serving excerpts quoted by the Remington Defendants are

[12] PLCAA's legislative history is replete with conflicting statements by members of Congress, which can be selectively cited to support nearly any point. *See, e.g.*, *Estate of Kim*, 295 P.3d at 387 ("The Estate points out portions of the PLCAA's legislative history supporting its interpretation [that PLCAA does not bar general negligence actions]. Senator Craig, the

not a fair or accurate guide to construing these subsections. Indeed, Senator Craig, whose statement the Remington Defendants rely on to "resolve[] any ambiguity" in the meaning of seller, is a perfect example of such unreliability. In the course of debating the passage of PLCAA, the Senator also said the opposite of what Remington would like this Court to believe:

> We have also tried to make the narrow scope of the bill clear by listing specific kinds of lawsuits that are *not* prohibited. Section 4 says they include: actions for harm resulting from defects in the firearm itself when used as intended—that is product liability suits—*actions based on the negligence or negligent entrustment by the gun manufacturer*, seller, or trade association; actions for breach of contract by those parties.

150 Cong Rec S1861 (Sen. Craig) (emphasis supplied) (cited portions of the Congressional record are attached as Exhibit A).[13] Other Congressional co-sponsors of PLCAA expressed similar views. *E.g.*, 151 Cong Rec S9063 (Sen. Coburn) ("Firearms and ammunition manufacturers or sellers may be held liable for negligent entrustment or negligence per se[.]").

PLCAA's sponsor, stated: 'If manufacturers or dealers break the law or commit negligence, they are still liable.' [Defendant] points out portions of the legislative history supporting his position. For example, Senator Reed stated: 'This bill goes way beyond strict liability. It says simple negligence is out the door.' .... The PLCAA's legislative history is not 'somewhat contrary' [to the plain meaning]; it is indeterminate, and it does not control the statute's interpretation.").

[13] The Remington Defendants argue that this quote is "misleading" because it cites from a debate on PLCAA during the previous session when the bill was not passed. *See* Remington Mem. at 12 n.4. For purposes of plaintiffs' point, the timing of the statement is unimportant. The definition of negligent entrustment under consideration, as recited by Senator Reed immediately after Senator Craig's comments, was effectively identical to the one codified in PLCAA: "Negligent entrustment is a defined term in the legislation. It means: . . . the supplying of a qualified product *by a seller* for use by another person when *the seller* knows, or should know, the person to whom the product is supplied to is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." Ex. A, 150 Cong Rec S1863 (Sen. Reed) (emphasis supplied); *see also* 151 Cong Rec S9087-88 (Sen. Craig) ("[I]f this bill and this debate seem familiar to any of us, it should, because the Senate debated a very similar measure a little over a year ago.").

PLCAA's legislative history offers no guidance on the question of whether Remington is a seller – or on any other question pertinent to the pending motions – and it should play no role in the Court's analysis.

D. Defendants' Restrictive Interpretation of Negligent Entrustment Is Wrong

Defendants challenge plaintiffs' negligent entrustment claim by arguing that "using" a firearm in a "manner involving unreasonable risk of physical injury" can only mean using to inflict injury. Thus, they conclude that a negligent entrustment action can only survive PLCAA if the defendant supplied the firearm directly to the person who caused harm – here, Adam Lanza. They categorically reject the notion that selling a weapon can constitute a "use." *E.g.*, Remington Mem. at 13; Camfour Mem. at 17.

The problem with this argument is that there is no support for it. It contravenes the plain meaning of the word "use" as well as the broader statutory context, and ignores the common law roots attached to the word.

1. The Plain Meaning of "Use" is Broad

In arguing that "use" of a firearm can only mean "using to cause harm," the defendants disregard both the plain meaning rule and United States Supreme Court precedent. In *Smith v. United States*, 508 U.S. 223 (1993) – decided more than a decade before PLCAA was enacted – the Supreme Court held that "using" a firearm encompasses more than using it for its "intended purpose" (that is, as a weapon) and further, that one may "use" a firearm by bartering it. *Id.* at 230. In *Smith*, the Court was called upon to discern "the everyday meaning" of the word "use" after a criminal defendant challenged a penalty enhancement on the grounds that trading a firearm in exchange for drugs did not constitute a "use" of the firearm under the statute. *Id.* at

228. After consulting multiple dictionaries and reviewing past interpretations of the term, the Court concluded that the ordinary meaning of "use" is expansive:

> Webster's defines "to use" as "[t]o convert to one's service" or "to employ." Black's Law Dictionary contains a similar definition: "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Indeed, over 100 years ago we gave the word "use" the same gloss, indicating that it means "'to employ'" or "'to derive service from.'" Petitioner's handling of the MAC-10 in this case falls squarely within those definitions. By attempting to trade his MAC-10 for the drugs, he "used" or "employed" it as an item of barter to obtain cocaine; he "derived service" from it because it was going to bring him the very drugs he sought.

Smith, 508 U.S. at 228-29 (citations omitted); *see also United States v. Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) ("The overwhelming majority of authority on the plain meaning of 'use' contemplates the application of something to achieve a purpose."). Notably, *Smith* rejected the argument that the statute required proof that the firearm was used *as a weapon*, noting simply that "the words 'as a weapon' appear nowhere in the statute." 508 U.S. at 229.[14]

Likewise, there is no indication in PLCAA's negligent entrustment definition that the firearm must be used as a weapon or used to directly cause harm. As in *Smith*, "use" must be given its ordinary meaning. There is no question that the Camfour and Riverview defendants "used" or "employed" the Bushmaster rifle as an item for sale, or that they "derived service"

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[14] The Remington Defendants argue that *Smith* is irrelevant because the Court's discussion of "use" arose in the context of criminal law and because the Supreme Court subsequently clarified in *Bailey v. United States*, 516 U.S. 137 (1995), that "use" of a firearm does not encompass mere storage. *See* Remington Mem. at 19. These observations are inapposite. First, the *Smith* Court did not derive the meaning of "use" by placing it in the context of the criminal laws; it looked to dictionary meanings to determine "the everyday meaning" of the word. 508 U.S at 228-29. And second, plaintiffs do not allege that the Camfour Defendants "used" the Bushmaster by storing it; they allege that defendants used the rifle by selling it. *See* FAC Count I ¶ 224 ("The Bushmaster Defendants knew, or should have known, that the Camfour Defendants' use of the product – supplying it to dealers who sell directly to civilians – involved an unreasonable risk of physical injury to others.").

from the rifle in the form of monetary compensation. As for Nancy Lanza, plaintiffs allege that she "bought the Bushmaster XM15-E2S to give to and/or share with her son in order to further connect with him." FAC ¶ 185. In doing so, she clearly "derived service" from the weapon.

The Camfour Defendants urge the Court to reject the plain meaning of use and adopt the interpretation of a New York court in *Williams v. Beemiller, Inc.*, No. 7056/2005 (N.Y. Sup. Ct. Erie Cnty. Apr. 25, 2011), *rev'd* 952 N.Y.S.2d 333 (N.Y. App. Div. 2012). *See* Camfour Mem. at 13-14. *Williams* – an unpublished opinion by a New York trial court that was reversed on appeal – lacks both precedential and persuasive authority. The Camfour Defendants rely on the trial court's ruling that PLCAA barred a negligent entrustment claim against a firearm distributor because it had not sold the firearm to "the ultimate shooter," and thus, did not sell "directly to the person misusing the product." Op. at 15. The only insight into that conclusion is the court's statement that "[a] review of the legislative history supports a narrow and limited exception to the general protections afforded manufacturers and sellers of firearms under the PLCAA." *Id.* The court does not explain what statutory ambiguity caused it to consult legislative history in the first place; nor does it mention that the legislative history it refers to is a letter to Congress from law professors that characterizes the bill in overreaching terms. *See* Op. at 15 (citing 157 Cong. Record H9004). Not only is such a letter an inappropriate source of legislative history, *see District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (legislative history "refers to the pre-enactment statements of those who drafted or voted for a law"), PLCAA's legislative history is hardly a model of clarity, *see supra* at I.B.3. [15]

[15] The Camfour Defendants also cite *Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693 (Conn. Super. May 26, 2011), in support of their preferred interpretation of "use." *Gilland* holds, consistent with Connecticut common law, that the theft of a firearm fails to come within PLCAA's definition of negligent entrustment because there is no allegation that the seller "supplied the firearm for [the entrustee]'s use." *Id.* at *13. It is unclear how this point is helpful

2. Other Language in PLCAA Confirms the Plain Meaning of "Use"

Congress' word choices in other parts of PLCAA ought to conclusively put the defendants' argument on the meaning of "use" to rest. In the threshold definition of "qualified civil liability action," the statute proscribes certain actions that result "from the criminal or *unlawful misuse* of a qualified product." *See* 15 U.S.C. § 7903(5) (emphasis supplied). And in the provision governing product liability claims, PLCAA refers to scenarios where "the *discharge* of the [firearm] was caused by a volitional act that constituted a criminal offense[.]" *Id.* § 7903(5)(A)(v) (emphasis supplied).

Congress' decision to include the terms "discharge" and "unlawful misuse" in the text of PLCAA indicates that it knew how to employ narrower terms to refer to specific uses of firearms, and that it did so when such terms were appropriate. Consequently, "use" must be read not merely to mean "discharge" or "unlawful misuse." *See Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 156 (2d Cir. 2013) (When "Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." (quotation marks and citation omitted)); *cf. Milner v. Dep't of Navy*, 562 U.S. 562, 131 S. Ct. 1259, 1272 (2011) (holding that "law enforcement purposes" must be read to "involve more than just investigation and prosecution" because other parts of the statute "demonstrate [that] Congress knew how to refer to these narrower activities").

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to the Camfour Defendants. Plaintiffs allege that Camfour supplied the Bushmaster XM15-E2S to Riverview for its use, *see* FAC Count II ¶ 224; they simply do not allege that Riverview was required to "use" the Bushmaster by causing injury to others. There is absolutely nothing in *Gilland* that suggests "use" should be read as narrowly as defendants would like.

Recently, in *Norberg v. Badger Guns*, No. 10-CV-20655 (Wis. Cir. Ct.), a Wisconsin court relied upon this precise argument in denying the defendant gun store's motion for summary judgment on plaintiffs' negligent entrustment claim:

> The defendants argue that the statutory definition of negligent entrustment [under PLCAA], that under the statutory definition, the person to whom Badger Guns supplied the firearm, which is Mr. Collins, was not the person, Mr. Burton, who thereafter used the firearm to harm the plaintiffs. . . . The Court does not believe that congress used the word, use, to mean exclusively discharge as the defendant suggests. In [§ 7903(5)(A)(v)], the statute uses the word, discharge. In section 15 U.S.C.A 7903(5)(b), congress chose to employ the term, use, not, discharge. . . . *Congress knew the difference between, discharge, and, use, and did not intend to use them interchangeably.*

Norberg, Oral Ruling on Def. Mot. Summ. Jud., at *19, 21(Jan. 30, 2014) (Conen, J.) (emphasis supplied), attached as Exhibit B.[16]

Relatedly, Congress repeatedly and exclusively used the term "misuse" in PLCAA when referring to the type of criminal activity that gives rise to a qualified civil liability action.[17] If

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[16] Common sense also confirms the plain meaning of "use." There are many ways to "use" a firearm in a manner that involves an unreasonable risk of physical injury to self or others. Using a loaded handgun as a prop in a children's game can certainly be said to "involve[e] [an] unreasonable risk of physical injury." Likewise, someone who makes a "straw purchase" – that is, purchases a firearm for another person who is prohibited from buying it themselves – is clearly using the weapon in a manner involving an unreasonable risk of harm. Indeed, courts have held that negligent entrustment claims based on straw sale allegations are not barred by PLCAA. *See Norberg*, No. 10-CV-20655, at *21 (Ex. B) (denying summary judgment on negligent entrustment claim where plaintiffs alleged that the defendant gun store should have known it was participating in a straw sale); *Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777, 788 (N.Y. Sup. Ct. 2014) (denying defendant gun store's motion to dismiss negligent entrustment claim because allegations that gun store should have known a straw sale was taking place was "not preempted by the clear language of the statute").

[17] *See* 15 U.S.C. § 7901(a)(3) (noting in the findings section that "lawsuits have been commenced ... which seek money damages and other relief for the harm caused by the misuse of firearms"); *id.* at § 7901(a)(5) (finding that gun companies "should not be liable for the harm caused by those who criminally or unlawfully misuse firearms products"); *id.* at § 7903(b)(1) (purpose of PLCAA is to "prohibit causes of action against [gun companies] for the harm solely caused by the criminal or unlawful misuse of firearm products"); *id.* at § 7903(5)(A) (defining

Congress had intended the narrow meaning of "use" that defendants suggest, it could have easily signaled that by using the term "misuse" in the negligent entrustment definition – i.e., "...when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, *misuse* the product in a manner involving unreasonable risk of physical injury to the person or others."

3. The Common Law Meaning of "Use" Confirms Its Plain Meaning

The meaning defendants attempt to give the word "use" in PLCAA's negligent entrustment definition also ignores, and is fundamentally incompatible with, the common law meaning of that term – which has repeatedly been held to embrace successive entrustments. As discussed above, PLCAA's formulation of negligent entrustment mirrors the common law iteration of "use," as expressed by Section 390 of the Restatement. *See* Rest. (Second) § 390 (supplier of chattel subject to liability where entrustee is likely to "use [the chattel] in a manner involving unreasonable risk of physical harm to himself and others").

Recognizing that the word "use" in PLCAA's negligent entrustment definition is culled from the Restatement informs the meaning of that word. It is a well settled principle of statutory interpretation that "when Congress uses language with a settled meaning at common law, Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). Thus, when language "'is

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"qualified civil liability action," as any action "resulting from the criminal or unlawful misuse of a [firearm]").

obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)); *see also United States v. Soler*, 759 F.3d 226, 234 (2d Cir. 2014) (same).

Here, the relevant body of law applying and interpreting Section 390 rejects defendants' argument about the meaning of "use" in the context of negligent entrustment. Cases decided under Section 390 teach that the person to whom the chattel is entrusted need *not* be the person who later employs it to cause physical harm. That is, a claim for negligent entrustment can involve multiple entrustments, so long as they are reasonably foreseeable.

This common law rule is exemplified by the cherry bomb case discussed above, *Collins v. Arkansas Cement Co.*, 453 F.2d 512 (8th Cir. 1972). The *Collins* court upheld a verdict against a cement manufacturer under Section 390 for negligently entrusting cherry bombs to employees, even though two additional entrustments preceded injury to the plaintiff. In *Collins*, an employee of the defendant – who had been entrusted with cherry bombs for dislodging cement – gave several of the bombs to a group of children; one of those children then gave a bomb to the minor plaintiff, who was injured when she set it off. Thus, the employee's only "use" of the cherry bomb was removing it from work and giving it to a group of children. Moreover, neither the second nor third entrustment was within the control of the defendant manufacturer. The Eighth Circuit nevertheless upheld the verdict.

Framing the issue as one of foreseeability, the court determined that the manufacturer's decision to entrust the bombs to employees without adequate precautions – and with reason to know that employees were not exercising the proper level of care – created an unreasonable and foreseeable risk that a cherry bomb would fall into careless or unsuspecting hands and thereby

cause injury. *See* 453 F.2d at 513-514 (manufacturer's rules regarding use of the cherry bombs were lax and it had notice that "employees were not faithful in returning the unused cherry bombs or were using them in horseplay around the plant"). Consequently, the successive entrustments did not sever the causal chain between the defendant's negligence and the plaintiff's injuries.

Numerous other courts have likewise found common law negligent entrustment claims sufficient where the entrustee's use of the chattel was confined to giving or lending it to another. *See, e.g., Rios v. Smith*, 95 N.Y.2d 647, 653 (N.Y. 2001) ("Thus, the evidence was legally sufficient for the jury to determine that [the defendant] created an unreasonable risk of harm to plaintiff by negligently entrusting the ATVs to his son, whose use of the vehicles involved lending one of the ATVs to Smith, another minor."); *Earsing v. Nelson*, 212 A.D.2d 66, 70 (N.Y. App. Div. 1995) (upholding denial of motion to dismiss negligent entrustment claim where minor purchaser of BB gun lent it to friend who shot and injured the plaintiff); *LeClaire v. Commercial Siding & Maint. Co.*, 308 Ark. 580, 583 (1992) (reversing trial court's dismissal of negligent entrustment claim where employer entrusted car to employee, who then entrusted it to another person; the court noted: "The real rub in this case is the fact that it involves two entrustments. That is not a bar to recovery."); *Schernekau v. McNabb*, 220 Ga. App. 772 (1996) (plaintiff properly stated negligent entrustment claim against woman who permitted her son to bring air rifle to campground, even though another camper – and not defendant's son – used the rifle to injure the plaintiff).

The Remington Defendants attempt to downplay the relevance of this common law precedent by arguing that the congruence between Section 390 and PLCAA is "not complete" and that any inference of Congressional intent to borrow the common law meaning is "purely

speculation." Remington Mem. at 16. Ignoring the fact that courts interpreting PLCAA have not only recognized this similarity, but have relied upon it to guide their assessment of negligent entrustment claims, *see* fn.6, *supra* (citing cases where courts have explicitly noted the parallels between Section 390 and PLCAA, including a Connecticut Superior Court case), the Remington Defendants purport to identify a "distinction" between the two texts from which Congress' intent to bar plaintiffs' claim should be inferred. They claim that PLCAA narrowed the Restatement's definition of negligent entrustment by specifying that the person who uses the product in a manner involving unreasonable risk of physical injury must be the same person to whom the defendant entrusts the product. *See* Remington Mem. at 16.

This straw man argument conflates the question of *who* must use the firearm in a manner involving an unreasonable risk of harm with the question of what *types of uses* are encompassed by PLCAA. Only the latter question is disputed. Plaintiffs have never claimed that a defendant is liable for negligent entrustment if *anyone* uses the firearm in an unreasonably risky manner. Plaintiffs acknowledge that both Section 390 and PLCAA revolve around the person to whom the chattel (or firearm) is supplied – the same person who then uses it in a manner involving an unreasonable risk of harm. Courts interpreting Section 390 have simply embraced an ordinary meaning of "use" that *includes* successive entrustments. Those decisions rightly inform the meaning of "use" in PLCAA's negligent entrustment definition.

Ultimately, however, defendants' focus on the meaning of the word "use" is not a textual argument at all. The premise of defendants' argument is an inaccurate and alarmist characterization of plaintiffs' claims: "Under Plaintiffs' expansive interpretation of 'use,' the initial lawful sale of any firearm, which passes through legal commerce and then is later used in crime, could be alleged to have been negligently entrusted." Remington Mem. at 17. And their

conclusion is no more than a self-serving rejection of that flawed premise: "[T]here is no way to reconcile that interpretation with the purpose of the PLCAA—to protect firearm sellers from lawsuits arising from the criminal use of firearms." *Id.* The essence of this argument is that, because PLCAA abrogates certain claims, every dispute as to the meaning of PLCAA must be resolved in their favor. This is not a recognized canon of statutory construction. To the contrary, "[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 127 (2d Cir. 2001).

E. Defendants' Focus on Legality is a Red Herring

The Remington Defendants (and to a lesser extent, the Camfour Defendants) spend considerable time establishing an undisputed point: the Bushmaster XM15-E2S was legal to sell and possess in Connecticut in 2010, and was lawfully sold to Nancy Lanza. *See, e.g.*, Remington Mem. at 2 ("The rifle had been lawfully purchased in 2010[.]"); *id.* at 2-3 ("Plaintiffs nevertheless seek to turn the lawful actions of the rifle's manufacturer into actionable wrongs[.]").

This emphasis on legal compliance misses the point. "There is all of the difference in the world between making something illegal and making it tortious. Making an activity tortious forces the people who derive benefit from it to internalize the costs associated with it, thereby making sure that the activity will only be undertaken if it is desired by enough people to cover its costs. It does not proscribe it altogether." *McCarthy v. Olin Corp.*, 119 F.3d 148, 169-170 (2d Cir. 1997) (Calabresi, J., dissenting).

Indeed, legality is by no means synonymous with reasonableness. Thus, in *Kalina v. Kmart Corp.*, 1993 WL 307630 (Conn. Super. Aug. 5, 1993) (Lager, J.), the Superior Court refused to enter summary judgment on plaintiff's negligent entrustment of a firearm claim despite Kmart's argument that the standard of care was set by federal law regulating the sale of firearm: "KMart's position is that its only obligation was to require the purchaser to provide appropriate identification and to complete a Firearms Transaction Record Form, ATF Form 4473, pursuant to federal regulation." *Id.* at *3. The court declined to adopt such a rule, noting that "the trier of fact is, in this state, given a wide latitude in drawing the inference of negligence." *Id.* at 5. Thus "what KMart knew or should have known, in light of any other evidence that is introduced concerning the surrounding circumstances, should be left to the trier of fact." *Id.* at 5; *see also Short v. Ross*, 2013 WL 1111820 (denying motion to dismiss negligent entrustment claim against U-Haul even though U-Haul met all of its legal obligations).

Moreover, a reading of PLCAA as a whole demonstrates that Congress envisioned negligent entrustment as a claim arising from *legal* firearm sales. The provision immediately following the negligent entrustment provision preserves "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product[.]" 15 U.S.C. § 7903(5)(A)(iii). In other words, there is an entirely separate provision under PLCAA for causes of action arising from the illegal sale of a firearm. Interpreting the negligent entrustment provision to apply only to illegal sales would render it superfluous. This cannot have been Congress' intent. *See United States v. Kozeny*, 541 F.3d 166, 174 (2d Cir. 2008) ("When interpreting a statute, we are required to give effect, if possible, to every clause and word of a statute, and to avoid statutory interpretations that render provisions superfluous.") (quotation marks and citation omitted).

F. Plaintiffs Do Not Allege Product Liability Claims

Defendants also incorrectly conflate negligent entrustment with product liability. Their motivation for doing so is obvious: PLCAA bars any product liability claim where the harm was caused by a criminal act.[18] Thus, by calling plaintiffs' claims something other than what they are, defendants hope to divert attention from PLCAA's negligent entrustment provision – which they know plainly allows plaintiffs' claims to proceed. This maneuver must be rejected.

Product liability and negligent entrustment are distinct causes of action in Connecticut. Though the Connecticut Product Liability Act ("CPLA") encompasses allegations of negligence in addition to governing strict liability, those allegations must still concern a defective product. *See Hurley v. Heart Physicians*, P.C., 278 Conn. 305, 325 (2006) ("[A] product liability claim under the [CPLA] is one that seeks to recover damages for personal injuries . . . *caused by the defective product*.") (emphasis supplied). "[T]he essence of the tort" of negligent entrustment, by comparison, is the act of supplying something to another under "circumstances where an

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[18] This is the reason *Jefferies v. D.C.*, 916 F. Supp. 2d 42 (D.D.C. 2013), which is relied upon by the Camfour Defendants, was dismissed immediately. In that case, the complaint made conclusory allegations against the manufacturer of the assault rifle used to kill the plaintiff's decedent, leading the court to conclude that the only plausible reading of the complaint was a product liability claim:

> Plaintiff makes a blanket assertion that [the manufacturer]'s negligence directly and/or indirectly contributed to Ms. Jones' death, and that [the manufacturer] owed a duty of care to Ms. Jones. … The Court cannot construe the allegations—or draw any plausible inferences from the allegations—in a way that would put this case under any of the exceptions of the PLCAA. The only exception that comes close is the one [for a product liability claim]. However, this exception does not apply "where the discharge of the product was caused by a volitional act that constituted a criminal offense." None of the exceptions to the PLCAA can plausibly apply in this case.

Id. at 46. In this context, the Camfour Defendants' assertion that *Jeffries* is indistinguishable from plaintiffs' claims is absurd. *See* Camfour Mem. at 10.

entrustor should know that there is cause why a chattel ought not to be entrusted to another." *Short*, 2013 WL 1111820, at *7.

Indeed, in *Short*, the court addressed and rejected the defendant's argument that plaintiff's negligent entrustment claim was barred by the CPLA's exclusivity provision. Although the plaintiff had separately alleged that U-Haul's truck had braking and acceleration defects, the negligent entrustment count arose from the entirely distinct allegation that U-Haul should have known the truck would be used at a football tailgate in a pedestrian-dense area around people who had been consuming alcohol. Thus, that negligence was unrelated to the alleged product defect and did not come within the CPLA's purview:

> The defendant is correct that the CPLA provides the exclusive remedy to a plaintiff who claims liability as a result of a defective product. The defendant is incorrect, however, in its assertion that count two [for negligent entrustment] alleges that a defective product caused the injury. As discussed, *supra*, the plaintiff has alleged sufficiently a claim for negligent entrustment. Accordingly, . . . the plaintiff necessarily alleges independent negligence, not negligence based upon allegations that the truck was defective. Thus, [the negligent entrustment] count is not precluded by the CPLA's exclusivity provisions.

Id. at *12.

Here, plaintiffs make no allegation that the Bushmaster XM15-E2S was defective – indeed, it functioned precisely as intended (that is, as a mass casualty weapon). Moreover, plaintiffs do not assert that defendants should be liable simply because the XM15-E2S is an unreasonably dangerous product to sell – indeed, it is an ideally dangerous product for a large consumer base (that is, military and law enforcement personnel). Plaintiffs' allegations focus on defendants' knowledge of the unreasonable risks associated with selling the Bushmaster XM15-E2S to the civilian market in 2010. Those allegations speak to the act of entrusting, not to a defect in the weapon. As such, defendants' reliance on the CPLA is inapt.

V. PLAINTIFFS' CUTPA CLAIMS SATISFY PLCAA AND CONNECTICUT LAW

In what is usually called the "predicate statute" provision of PLCAA, PLCAA leaves intact claims against gun sellers for knowing violations of state statutes applicable to the sale or marketing of firearms. PLCAA does *not* bar "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product[.]" 15 U.S.C. § 7903(5)(A)(iii). Since CUTPA is "applicable to the sale and marketing" of guns in Connecticut, it is an appropriate predicate statute.

Although defendants have filed a new round of briefing on the predicate provision and CUTPA, the core issues before the Court remain the same. The Second Circuit in *Beretta* held that statutes such as CUTPA are appropriate predicates. As the Court has already discerned, the real issue is whether plaintiffs have (non-jurisdictional) standing to assert CUTPA claims. And plaintiffs do have such standing, not because they were in a consumer relationship with defendants, but because of the nature of defendants' conduct. Defendants' Motions to Strike the CUTPA claims must be denied.

A. The Court Cannot Strike Entire Counts on the Basis of Defendants' CUTPA Arguments

Defendants move to strike entire counts against them, based on their CUTPA arguments. The Court cannot do so because the negligent entrustment allegations and the CUTPA allegations are made in the same counts.[19] "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." *Fort Trumbull Conservancy, LLC*, 262 Conn. at 498. For this reason alone, defendants' CUTPA arguments should be rejected.

[19] Defendants could have filed Requests to Revise seeking to have the claims divided into separate counts. They elected not do so, waiving that right. *See* Prac. Bk. §§10-35, 10-38.

B. The Second Circuit's Decision in *Beretta* Indicates CUTPA Is an Appropriate Predicate Statute

PLCAA provides that a qualified action "shall not include":

> an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . .

15 U.S.C. § 7903(5)(A)(iii).

This provision has been construed by the Second and Ninth Circuits, the District of Columbia Court of Appeals, the Indiana Appellate Court and the Alaska Supreme Court. *Beretta*, 524 F.3d at 399-404; *Ileto v. Glock*, 565 F.3d 1126, 1131-38 (9th Cir. 2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 169-72 (D.C. Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 429-30 (Ind. App. 2007), *transfer denied*, 915 N.E.2d 978 (Ind. 2009); *Estate of Kim*, 295 P.3d at 393-94.

Of these decisions, the Second Circuit's decision in *Beretta*, while not binding on the Court, ought to be very significant in the Court's analysis. *See Turner v. Frowein*, 253 Conn. 312, 340-41 (2000) (decisions of the Second Circuit concerning issues of federal law, "though not binding [on a Connecticut court], are particularly persuasive").[20] Defendants argue that *Beretta* supports their position. Remington Mem. at 20, 23, 25-26; Camfour Mem. at 24-28. Their reliance on *Beretta* is completely misplaced.

[20] The Remington Defendants rely heavily on *Ileto*, in which the Ninth Circuit construed the predicate exception much more narrowly than did the Second Circuit in *Beretta*. Remington Mem. at 23, 24, 26. The Camfour Defendants rely on an even less persuasive authority, the ruling of the District Court in *Ileto*. Camfour Mem. at 27. Because the Second Circuit and the Ninth Circuit disagree about how to read the predicate provision, the Ninth Circuit's ruling in *Ileto* has little persuasive weight, and the *Ileto* District Court's ruling has even less.

Beretta holds that the predicate provision encompasses both statutes "applied to the sale and marketing of firearms" and statutes that "clearly can be said to implicate the purchase and sale of firearms." *Beretta*, 524 F.3d at 404. CUTPA, of course, fits both of these categories. In *Beretta*, the City brought nuisance and other claims against gun makers and sellers, asserting they distributed and sold firearms in a manner that increased their use by criminals. The City argued that its statutory nuisance claim satisfied PLCAA's predicate provision. On appeal Judge Miner, writing for a two-judge majority, rejected the statutory public nuisance predicate but indicated that the predicate provision encompasses some statutes of general application.

The *Beretta* court recognized that the key question is what "applicable" means: "Central to the issue under examination is what Congress meant by the phrase 'applicable to the sale or marketing of [firearms].' The core of the question is what Congress meant by the term 'applicable.'" *Beretta*, 524 F.3d at 399. Rather than use the plain meaning of "applicable," the court narrowed that meaning in certain respects.[21] It emphasized that:

> We find nothing in the statute that requires any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception. *We decline to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute.*

524 F.3d at 399-400 (emphasis supplied). It determined finally:

> In sum, *we hold* that the exception created by 15 U.S.C. § 7903(5)(A)(iii): (1) does not encompass New York Penal Law § 240.45; *(2) does encompass statutes* (a) that expressly regulate firearms, *or (b) that courts have applied to the sale and marketing of firearms; and (3) does encompass statutes that do not*

[21] For example, the court determined that in light of subsections (I) and (II) of the predicate provision, it would find a "textual definition" of "applicable," rather than follow its plain meaning. *Id.* at 401. (This was an application of the rule of *eiusdem generis*.) It then turned to the legislative history. While the Court should look to the *City of New York* decision as persuasive, it need not make the same interpretive choices.

> *expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms.*

524 F.3d at 404 (emphasis supplied). Thus, while it is true that the Second Circuit dismissed the City's statutory nuisance claim, the Second Circuit's holding concerning the meaning of PLCAA's predicate provision is the passage above.[22]

1. CUTPA Is an Appropriate Predicate under Two of the Three *Beretta* Categories

CUTPA is an appropriate predicate under *Beretta* category 2(b) ("statutes . . . that courts have applied to the sale and marketing of firearms") and category 3 ("statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms"). *See Beretta*, 524 F.3d at 404. The purpose of CUTPA is well established under Connecticut law:

> [T]he purpose of CUTPA is to protect the public from unfair practices in the conduct of any trade or commerce, and whether a practice is unfair depends upon the finding of a violation of an identifiable public policy. . . . CUTPA, by its own terms, applies to a broad spectrum of commercial activity. The operative provision of the act, [General Statutes] § 42–110b(a), states merely that no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Trade or commerce, in turn, is broadly defined as the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.

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[22] *City of New York*'s determination that the nuisance statute would not serve as a predicate must be understood in the context of prior decisions by New York's high courts rejecting like claims. In 2001, the New York Court of Appeals held that gun manufacturers did not owe victims of gun violence a general duty of care in connection with the marketing and distribution of hand guns. *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 230-31, 240 (N.Y. 2001). Two years later, the Appellate Division of the New York Supreme Court affirmed the dismissal of public nuisance claims brought against gun manufacturers, distributors, and sellers in connection with their marketing and sales practices, finding that *Hamilton* foreclosed such claims. *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 194-95 (N.Y. App. 2003). In other words, the statutory nuisance claim did not fail because the statute in issue was generally applicable; it failed because New York's high courts had already indicated their disapproval of such a claim.

Willow Springs Condo. Ass'n, Inc. v. Seventh BRT Devel. Corp., 245 Conn. 1, 42 (1998) (citation omitted). CUTPA works under 2(b) because CUTPA has been applied to the sale and marketing of firearms; it works under 3 because CUTPA clearly implicates and is applicable to the sale and marketing of firearms. *See Salomonson v. Billistics, Inc.*, 1991 WL 204385, at *12 (Conn. Super. Sept. 27, 1991) (Freeman, J.T.R.) (applying CUTPA to transaction involving firearms; stating that "[t]he instant transaction for the sale, manufacture and delivery of remanufactured weapons . . . meets the statutory definition of trade or commerce, C.G.S. § 42-110a(4)").

2. Defendants Ignore *Beretta*'s Holding and the Plain Language of the Predicate Provision

Knowing *Beretta*'s persuasive weight, defendants pay lip service to that decision while asking the Court to construe the predicate provision far more narrowly than *Beretta* did. The long list of federal, state and municipal statutes at pages 21-22 of the Remington Defendants' brief is a smoke screen: Remington does not want the Court to focus on what *Beretta* says.

Defendants complain that if CUTPA is a predicate statute, the reach of the predicate provision will be too broad, Remington Mem. at 25-29; Camfour Mem. at 27–28. Their construction of the predicate provision – as allowing only predicates which specifically mention firearms – was advanced *and rejected* in *Beretta*:

> The Firearms Suppliers argued that a predicate statute must explicitly mention firearms and that a general statute could not serve as a predicate statute even if a state's highest court were to construe that statute as applicable to firearms. . . . We disagree with this argument and, as set forth in more detail below, do not construe the PLCAA as foreclosing the possibility that predicate statutes can exist by virtue of interpretations by state courts.

Beretta, 524 F.3d at 396 (citation omitted); *see also id.* at 399-400, 404. In addition, defendants ignore the language of the predicate provision, which *is* broad. Plain meaning analysis, which

defendants agree is the correct approach, requires the Court to give full weight to Congress' choice of words in the predicate provision, not to words defendants would prefer.

Finally, the Remington Defendants assert that if knowledge of wrongfulness is not an element of CUTPA itself, CUTPA cannot be a predicate, Remington Mem. at 29, again ignoring the wording of the predicate provision. PLCAA requires proof that the predicate statute was knowingly violated, not that knowledge be an element of the predicate statute itself. *See* 15 U.S.C. § 7903(5)(A)(iii).

C. The Plain Language of the Predicate Provision Again Confirms That CUTPA Is an Appropriate Predicate Statute

While *Beretta*'s interpretation of the predicate provision is highly persuasive, it is not binding. *See Turner*, 253 Conn. at 340-41 (Second Circuit decisions "not binding" but "particularly persuasive"). Federal canons of construction require that the plain meaning of statutory language be given effect. Thus, the plain meaning approach used by the dissenting Second Circuit Judge in *Beretta* and by the District Court Judge in that case is also persuasive authority. *See Dark-Eyes.*, 276 Conn. at 571 (Connecticut courts follow plain meaning rule in construing federal statutes).

All four Second Circuit judges who considered the predicate provision (Judges Miner, Cabranes, Katzmann, and Weinstein) agreed that "applicable" is a broad term, meaning "capable of being applied." Two judges (Judges Weinstein and Katzmann) determined that the meaning of the predicate provision was clear on its face and would simply have implemented its plain language. *Beretta*, 524 F.3d at 404-05 (Katzmann, J., dissenting); *Beretta*, 401 F. Supp. 2d at

261 (Weinstein, J.); *see also City of Gary*, 875 N.E.2d at 434 (predicate provision is unambiguous and encompasses statutes "applicable to the sale or marketing" of firearms).[23]

Under either the *Beretta* construction or the plain meaning construction of the predicate provision, plaintiffs' CUTPA claims come within PLCAA's predicate provision.

D. CUTPA Authorizes Plaintiffs' Claims

Defendants assert that plaintiffs' CUTPA claims cannot survive because they are really product liability claims, plaintiffs are not consumers or competitors, CUTPA does not allow personal injury damages, the CUTPA claims are time-barred, and the CUTPA claims are pre-empted by regulation. Remington Mem. at 22-24; Camfour Mem. at 20-24. This scattershot attack is easily answered: plaintiffs are not making product liability claims; CUTPA allows "any person" to seek relief under its terms; CUTPA does allow personal injury and wrongful death damages; the CUTPA claims are not time-barred because the wrongful death limitations period governs them; and the record is not ripe for the Court to address a regulation defense.

1. Plaintiffs' CUTPA Claims Are Not Product Liability Claims

Plaintiffs' CUTPA claims are not foreclosed by Connecticut's Products Liability Act (CPLA). Plaintiffs' claims are founded in negligent entrustment, not product liability. *See*

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[23] In addition, the *Beretta* majority's use of the interpretive principle of *eiusdem generis* to narrow the predicate provision somewhat is problematic. *Beretta* looks to subparts (I) and (II) of the predicate provision and determines that the examples listed there limit the scope of the provision. *Eiusdem generis* is "only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." *Gooch v. U.S.*, 297 U.S. 124, 128 (1936). Far from limiting the predicate provision, the subparts broaden it by "including" lists of additional claims against gun manufacturers and sellers that are not barred by PLCAA. "'[I]ncludes' is a term of enlargement, not of limitation." *Alarm Indus. Communications Committee. v. F.C.C.*, 131 F.3d 1066, 1070 (D.C. Cir. 1997); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994) (the term "including" indicates an "'illustrative and not limitative' function" that "provide[s] only general guidance" about Congressional intent).

Argument Part IV.F. above. Plaintiffs do not claim the XM15-E2S is a defective product in any respect. Thus defendants' arguments based on the CPLA, Remington Mem. at 29-30, 33-34; Camfour Mem. at 22-23, must be rejected.

The CPLA's exclusivity provision "makes the product liability act the exclusive means by which a party may secure a remedy for an injury *caused by a defective product*." *Gerrity v. R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 125-26 (2003) (emphasis supplied) (discussing Conn. Gen. Stat. § 52-572n(a)). A CUTPA claim is not a CPLA claim if the CUTPA claim is not premised on product defect or failure to warn of a product defect.

A few Superior Court have recognizing and applied this aspect of the *Gerrity*. *See, e.g.*, *Osprey Properties, LLC v. Corning*, 2015 WL 9694349, at *5, 7 (Conn. Super. Dec. 11, 2015) (Arnold, J.) (determining CUTPA claim was not subsumed by the CPLA where the plaintiff's CUTPA allegations concerned the defendants' conduct, not product defect *per se*); *cf. Dibello v. C.B. Fleet Holding Co, Inc.*, 2007 WL 2756374, at *3 (Conn. Super. Aug. 31, 2007) (Mintz, J.) (striking CUTPA claim incorporating failure to warn allegations as subsumed by CPLA because it did not allege malfeasance by the defendants).

The Remington defendants argue that because plaintiffs make allegations concerning Remington's marketing of AR-15s, the CUTPA claims must be CPLA claims. Remington Mem. at 30. CPLA marketing claims would hinge either on an underlying defective product or on failure to warn (of a product defect or unsafe characteristics). As *Gerrity* observes, the CPLA was not designed to eliminate "claims that previously were understood to be outside the traditional scope of a claim for liability based on a defective product." *Gerrity*, 263 Conn. at 128. Plaintiffs' CUTPA claims are exactly that. Product liability cases seek redress for harm caused by a defective product. Plaintiffs here allege no such injuries. The XM15-E2S

functioned with the exact degree of lethality that defendants intended. Moreover, defendants' marketing of that weapon deliberately and accurately portrayed its assaultive capacity and military use. Plaintiffs' CUTPA claims are thus clearly distinguishable from claims subsumed by the CPLA.

Defendants refer the Court to cases premised on allegations of product defect, including marketing of a defective product, failure to warn, or both. *See Fraser v. Wyeth*, 857 F. Supp. 2d 244, 258 (D. Conn. 2012) (design defect and failure to warn regarding risk of hormone therapy medication); *Johannsen v. Zimmer, Inc.*, 2005 WL 756509 (D. Conn. Mar. 31, 2005) (defective hip prosthesis); *Mountain W. Helicopter, LLC v. Kaman Aerospace Corp.*, 310 F. Supp. 2d 459, 462-64 (D. Conn. 2004) (defective helicopter clutch); and *Hurley v. Heart Physicians*, 278 Conn. 305 (2006) (defectively designed pacemaker; failure to warn about proper functioning of pacemaker). None of these cases is apposite, because plaintiffs here make no claim for product defect, marketing of a defective product, or failure to warn.

2. Any Person Who Suffers Any Ascertainable Loss of Money or Property May Sue under CUTPA

Our Supreme Court has allowed consumers, competitors, and those in business relationships to proceed under CUTPA. This is not the limit, however, of CUTPA's reach. CUTPA's plain language gives a right to sue to *"[a]ny person* who suffers *any ascertainable loss* of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [§] 42-110b[.]" Conn. Gen. Stat. § 42-110g (emphasis supplied).

Section 1-2z directs the Court to look both to "the text of the statute itself" and to "its relationship to other statutes." Conn. Gen. Stat. § 1-2z. CUTPA's textual definition of who may seek relief – "any person who suffers any ascertainable loss of money or property" – serves its remedial purpose. *See* Conn. Gen. Stat. § 42–110b(d) ("It is the intention of the legislature that

this chapter [CUTPA] be remedial and be so construed.") The statute seeks to remedy unfair trade practices by "encourag[ing] litigants to act as private attorneys general[.]" *Thames River Recycling, Inc. v. Gallo*, 50 Conn. App. 767, 794-95 (1998). Authorizing "any person" harmed by an unfair trade practice to pursue a CUTPA action serves the statute's purpose by recognizing the greatest number of "private attorneys general" to serve and enforce the statute's goals.

CUTPA's relationship with other statutes reinforces this understanding of the meaning of Section § 42-110g. Many Connecticut statutes provide that violation of their provisions is a violation of CUTPA. These statutes, like CUTPA, are best served by the application of § 42-110g's broad textual definition of the plaintiff class. As the legislature knew, Connecticut's Attorney General could not possibly investigate and pursue actions for violations of all of these statutes. The broad private right of action – and the resulting broad class of plaintiffs who may bring suit – is necessary if these statutes are to be enforced. *See, e.g.*, Conn. Gen. Stat. § 14-106d(b) (the manufacturing, importing, offering for sale and sale of nonfunctional airbags are CUTPA violations); Conn. Gen. Stat. § 19a-904d (health information blocking is a CUTPA violation); Conn. Gen. Stat. § 21-83e (violation of state statutes concerning mobile home parks is a CUTPA violation); Conn. Gen. Stat. § 42-300 (violation of statutes setting requirements for sweepstakes is a CUTPA violation); Conn. Gen. Stat. § 48-30 (misrepresentation of power to acquire property by eminent domain is a CUTPA violation). For CUTPA to serve its full remedial purpose, any person who suffers any ascertainable loss due to such a violation should be permitted to act as a "private attorney general" and bring a CUTPA claim.[24]

[24] Since CUTPA's text and relationship with other statutes do not create any ambiguity as to the breadth of the plaintiff class, the Court need not refer to CUTPA's legislative history. *See* Conn. Gen. Stat. § 1-2z. In any event, the legislative history supports this construction, because the legislature eliminated CUTPA's privity requirement in 1979. P.A. 79-210; *see also* Ex.C, Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 1979 Sess., pp. 1159-1160, Remarks of

Thus in *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480 (1995), the Court correctly noted that the language of Section 42-110g does not single out any particular relationship as conferring CUTPA standing. *Larsen* reads CUTPA as applying to competitors and consumers, but does not limit the statute's reach to such relationships:

> [T]here is no indication in the language of CUTPA to support the view that violations under the act can arise only from consumer relationships. *Indeed, various provisions of CUTPA reveal that the opposite is true.* CUTPA provides a private cause of action to "any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . ." General Statutes § 42–110g(a). "Person," in turn, is defined as "a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity . . . ." General Statutes § 42–110a(3). If the legislature had intended to restrict private actions under CUTPA only to consumers or to those parties engaged in a consumer relationship, it could have done so by limiting the scope of CUTPA causes of action or the definition of "person," such as by limiting the latter term to "any party to a consumer relationship." "The General Assembly has not seen fit to limit expressly the statute's coverage to instances involving consumer injury, and we decline to insert that limitation."

232 Conn. at 492-97 (trial court erred in failing to consider the defendant's activities rather than his relationship to the plaintiff as a basis for a CUTPA claim) (emphasis supplied and citations omitted); *see also Fink v. Golenbock*, 238 Conn. 183, 213 (1996) ("it was not the employment relationship that was dispositive [in *Larsen*], but the defendant's conduct"); *McLaughlin Ford, Inc., v. Ford Motor Co.*, 192 Conn. 558, 566-67 (1984) (plaintiff's CUTPA standing determined solely by reference to § 42-110g(a)).

Ass't Atty Gen. Arnold Reinger ("The deletion will correct an ambiguity which now exists by virtue of a 1975 amendment to the Connecticut Unfair Trade Practices Act. . . . The amendment will now allow a suit by any person who suffers any ascertainable loss of money or property. Numerous arguments have been raised in both state and federal courts that the plaintiff, in order to sue, must be a purchaser or a lessee of a seller or lessor. Clarification of Section 42-110GA is essential in order to avoid needless litigation of the particular phrase now found in the statute"); Ex. D, 145 S. Proc., Pt. 8, 1979 Sess., p. 2575, Remarks of Sen. Casey ("The Attorney General's office is hampered in this enforcement effort by limited staff. Private litigation under this act is essential[.]").

Ganim v. Smith & Wesson Corp., 258 Conn. 313, 359-61 (2001), is an important indication that plaintiffs here should be permitted to pursue their CUTPA claims. In *Ganim*, the City of Bridgeport brought suit against gun manufacturers and dealers asserting nuisance, product liability and CUTPA claims. The City claimed its own damages – it did *not* claim damages on behalf of individual victims of gun violence. The Court dismissed the case because the City's claims were too derivative. *Id.* at 355. It observed, however, that the primary victims of gun violence were appropriate plaintiffs in such a suit.[25]

Defendants rely on a number of cases that they argue limit CUTPA. Remington Mem. at 31-32; Camfour Mem. at 21-22. In *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 157-58 (2005), the Court did reject a CUTPA claim (in the context of a motion to strike) because the plaintiff was neither a consumer, nor a competitor, nor in a business relationship with the defendant. The *Ventres* court did not, however, reconcile its ruling with its statements in *Ganim*.[26] *See* 12 Conn. Prac. Series, Langer *et al.*, *Unfair Trade Practices* § 3.6 at n.39 (online ed. 2015-2016) (observing that *Ganim* "suggest[s] that the breadth of the class of potential CUTPA plaintiffs is still an open question"). *Pinette v. McLaughlin*, 96 Conn. App. 769 (2006),

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[25] The *Ganim* Court stated: "the harm suffered by the potential other plaintiffs, which include all of the primary victims mentioned previously [victims of gun violence], exists at a level less removed from the alleged actions of defendants. They include, for example, all the homeowners in Bridgeport who have been deceived by the defendants" misleading advertising, all of the persons who have been assaulted or killed by the misuse of handguns, and all of the families of the persons who committed suicide using those handguns." *Id.* at 360. Recovery *by those plaintiffs* would more likely be appropriate: "We have already identified some of the directly injured parties who could presumably, without the attendant [remoteness] problems [the City has as a plaintiff] . . . , remedy the harms directly caused by the defendants" conduct and thereby obtain compensation[.]" *Id.* at 359. The Court did not reach the substantive sufficiency of plaintiffs" CUTPA allegations. *Id.* at 372.

[26] *Ventres* also does not engage in a § 1-2z plain meaning analysis of § 42-110g. *See Ventres*, 275 Conn. at 156-58.

a case in which the court entered summary judgment on a CUTPA claim because the plaintiff was not a consumer, a competitor or in a business relationship with the defendant, relies on *Vacco v. Microsoft Corp.*, 260 Conn. 59, 88-89 (2002), which in turn relies on *Ganim* to describe the boundaries of who may bring a CUTPA claim. We acknowledge that these cases and the others cited (*e.g.*, *Caltabiano v. L&L Real Estate Holdings II, LLC*, 2009 WL 1054288 (Conn. Super. Mar. 20, 2009), *aff'd*, 128 Conn. App. 84 (2011)) support defendants' construction of CUTPA; we do not view them, however, as determinative in light of *Ganim*, the language of the statute itself, and our rules of statutory construction under Section 1-2z.

In the end, the language of Section 42-110g(a) must determine which plaintiffs may bring CUTPA claims. Plaintiffs allege here that they suffered ascertainable financial loss. *E.g.* FAC ¶ 229. This allegation should suffice to enable plaintiffs to proceed under CUTPA.

3. CUTPA Provides a Remedy for Personal Injury and Wrongful Death

Defendants assert that CUTPA does not allow recovery for "damages flowing from personal injury or wrongful death." Remington Mem. at 32; Camfour Mem. at 22-23.. But the reverse is true: "[a] majority of trial courts addressing the issue have . . . held that damages for personal injuries can be recovered under CUTPA." 12 *Conn. Prac. Series* § 6.7 at n.19 (citing cases). Indeed, this Court has previously noted that "the Connecticut Supreme Court, in *Stearns & Wheeler, LLC v. Kowalsky Bros., Inc.*, 289 Conn. 1, 10 . . . (2008), stated that the CUTPA claim would include a claim for personal injuries . . . ." *Builes v. Kashinevsky*, 2009 WL 3366265, at *4 (Conn. Super. Sept. 15, 2009) (Bellis, J.); *see also, e.g.*, *Abbhi v. AMI*, 1997 WL 325850, at *3-4 (Conn. Super. June 3, 1997) (Silbert, J.) (explaining why plaintiffs may recover under CUTPA for both personal injury and wrongful death). Therefore this challenge also fails and plaintiffs' complaint adequately presents viable claims under CUTPA.

Remington cites to *Gerrity* once again to support its argument that a plaintiff may not recover for personal injuries or wrongful death under CUTPA. Remington Mem. at 32 (citing *Gerrity*, 263 Conn. 129-30). The Court in *Gerrity*, however, explicitly limited its opinion, and did not reach the question of what damages are available under CUTPA. *Gerrity*, 263 Conn. at 131 ("The types of damages permitted under CUTPA and to whom they are available, is beyond the scope of this certified question."). Remington also misunderstands *Haynes v. Yale New Haven Hosp.*, 243 Conn. 17 (1997). *Haynes* holds that simple medical negligence is not a proper basis for a CUTPA claim; it does *not* hold that the plaintiff's death is not compensable under CUTPA. *Haynes* suggests the Supreme Court believes death *is* compensable under CUTPA, if the plaintiff can prove the elements of CUTPA.

4. The CUTPA Claims Are Timely Filed

Defendants assert that the CUTPA claims against them are time-barred. Remington Mem. at 32-33; Camfour Mem. at 23-24. They are not. Although the claims are asserted under CUTPA, they are governed for limitations purposes by the wrongful death statute. *See Pellechia v. Connecticut Light & Power Co.*, 52 Conn. Supp. 435 (2011) (holding that CUTPA claims seeking damages for wrongful death were governed by § 52-555), *aff'd*, 139 Conn. App. 88 (2012), *cert. denied*, 307 Conn. 950 (2013).

The court in *Pellechia* explained:

> "The wrongful death statute; General Statutes § 52–555; is the sole basis upon which an action that includes as an element of damages a person's death or its consequences can be brought." *Lynn v. Haybuster Mfg., Inc.*, 226 Conn. 282, 295, . . . (1993). "As a result, where damages for a wrongful death are sought, the pertinent statute of limitations is to be found in § 52–555 rather than the statutes of limitations for torts or negligence generally." *Spruill v. Ahmed*, . . . 2003 WL 1477662 (March 10, 2003) (*Sferrazza, J.*) (34 Conn. L. Rptr. 239). "This rule, however, does not bar the plaintiff from advancing alternative theories of recovery, or causes of action, pursuant to the wrongful death statute." . . .

> *Monterio v. Crescent Manor*, , . . . 2004 WL 1245906 (May 21, 2004) (*Matasavage, J.*).
>
> Here, all of the plaintiff's claims against the CL & P defendants seek damages arising from the death of the plaintiff's decedent in July, 2006. While he has advanced different theories of liability (such as negligence, recklessness, and violation of the Connecticut Unfair Trade Practices Act [CUTPA], General Statutes § 42–110a et seq.), they all are subject to the two year limitations period set forth in § 52–555. *See Greco v. United Technologies Corp.*, supra, 277 Conn. at 348–50.

Pellecchia, 52 Conn. Supp. at 445 (portions of citations omitted).

The Remington Defendants argue that *Pellecchia* is inapposite. Remington Mem. at 33. Once again, they ignore a straightforward holding. *Pellechia* holds that Section 52-555 governs a claim for wrongful death made under CUTPA. The Appellate Court adopted that holding, and it is binding on the Court. *See Pellecchia,* 139 Conn. App. at 90 ("Because the trial court thoroughly addressed the arguments raised in this appeal, we adopt its well reasoned decision as a statement of the facts and the applicable law on the issue."). The Camfour Defendants fail to cite *Pellecchia*, let alone distinguish it.

The Remington Defendants then contend that the CUTPA statute must *also* apply. But that is not at all what *Pellechia* holds, nor would it make sense to impose the strictures of two limitations periods on the class of plaintiffs who assert CUTPA wrongful death claims. The Supreme Court's reasoning in *Greco v. United Techs. Corp.*, 277 Conn. 337, 349 (2006), confirms *Pellechia's* holding. In *Greco*, the plaintiff asserted a wrongful death claim under Section 52-577c(b). The Court found that in an action for wrongful death, Section 52-577c(b) did not trump the limitations period set by Section 52–555, in part because the legislature could easily have enumerated Section 52-555, along with Sections 52-577 and 52-577a, as one of the statutes of limitation preempted by Section 52-577c(b). As the legislature did not do so, this was

"strong evidence" that the legislature did not intend for Section 52-577c(b) to preempt Section 52-555.[27]

The plaintiffs concede that Natalie Hammond's CUTPA claim, which does not sound in wrongful death, is time-barred.

5. Defendants' Argument Based on Section 42-110c Is Premature

Defendants assert that the CUTPA counts must be stricken based on CUTPA's regulatory preemption exception, Section 42-110c.[28] Remington Mem. at 35; Camfour Mem. at 21 n.14. These arguments are both improper and premature. The First Amended Complaint does not allege the extent to which the actions in issue are regulated; defendants supply those factual claims themselves. In ruling on a motion to strike, the Court cannot "cannot be aided by the assumption of any facts not . . . alleged [in the complaint.]" *Liljedahl Bros.*, 215 Conn. at 348.

A Section 42-110c(a) defense, moreover, should be specially alleged and then raised by motion for summary judgment. "[A]pplicability of § 42–110c(a)(1) was not properly before the court in connection with the motion to strike. The special defense asserting such a claim . . . was not made part of the record until after the motion to strike was denied." *Higbie v. Hous. Auth. of*

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[27] Remington then claims there is a Superior Court "split" as to whether CUTPA survives death. Remington Mem. at 33 n.14. This is not so. *Pellecchia*'s affirmance makes it clear that a CUTPA claim does survive death. The Remington Defendants cite *Touchette v. Smith*, 1993 WL 410112, at *4 (Conn. Super. Oct. 5, 1993) (Booth, J.). *Touchette* was decided well before *Pelleccia* was affirmed, as was *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 174 (D. Conn. 2002). *Abbhi*, 1997 WL 325850, at *4, thoroughly rejects *Touchette*'s reasoning in any event. *See id.* ("To read CUTPA so as to preclude a claim based on the fortuity of death would be contrary to the statute's remedial purpose.").

[28] Section 42-110c(a)(1) provides: "(a) Nothing in this chapter shall apply to: (1) Transactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States[.]" Subsection (b) provides that "[t]he burden of proving exemption" is on "the person claiming the exemption."

Town of Greenwich, 2015 WL 5236728, at *3 (Conn. Super. July 31, 2015) (Povodator, J.); *cf. Connelly v. Housing Authority of New Haven*, 213 Conn. 354, 359 (1990) (determining – on the basis of a record created on summary judgment – that the New Haven Housing Authority is a "creature of statute" and its actions are pervasively regulated by HUD and the Statement Department of Housing).

6. The Camfour Defendants Waived the Opportunity to Challenge the Factual Sufficiency of the Allegations Against Them

The Camfour Defendants argue that plaintiffs have not sufficiently or particularly alleged the factual bases for the CUTPA claims against them. Camfour Mem. at 21. By electing not to file a Request to Revise, Camfour waived this argument. "[T]he proper motion to challenge a failure to plead facts is a request to revise and not a motion to strike." *Salzano*, 2005 WL 2502701, at *1; *Poseidon Group, Inc.*, 2004 WL 2591963, at *1 ("[I]f the plaintiff desired a fuller factual statement of the defense, it should have filed a request to revise."); *Durkin*, 2001 WL 490772, at *1 ("Failure to plead facts is a defect of form which should have been addressed by a request to revise.").

VI. CONCLUSION

For the reasons set forth above, defendants' Motions to Strike should be denied.

THE PLAINTIFFS,

By /s/ Joshua Koskoff

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CERTIFICATION

This is to certify that a copy of the foregoing has been mailed, postage prepaid, and emailed this day to all counsel of record, to wit:

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Bushmaster Firearms, a/k/a;
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EXHIBIT A

INTERPOL issued a Red Notice asking member states to help bring him to justice.

Today, Mr. Taylor remains beyond the reach of the court. He is in Nigeria—shielded by that government. To make matters worse, Taylor continues to work to destabilize parts of West Africa. The State Department says it will not pressure Nigeria to turn Taylor over to the court.

This is completely unacceptable. Taylor is under indictment by a UN-backed court. He continues to destabilize parts of West Africa. We know where he is. The United States needs to act and it needs to act now.

Yesterday, Senator GREGG and I—along with 5 other Senators—sent a letter to the State Department urging immediate action to get Taylor to the court. It is time for the United States to do the right thing. It is time for Taylor to come before the court.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER. Under the previous order, the leadership time is reserved.

PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of S. 1805, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 1805) to prohibit civil liability actions from being brought or continuing against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

Pending:

Hatch (for Campbell) amendment No. 2623, to amend title 18, United States Code, to exempt qualified current and former law enforcement officers from State laws prohibiting the carrying of concealed handguns.

Kennedy amendment No. 2619, to expand the definition of armor piercing ammunition and to require the Attorney General to promulgate standards for the uniform testing of projectiles against body armor.

Craig (for Frist/Craig) amendment No. 2625, to regulate the sale and possession of armor piercing ammunition.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, today we begin the third day of debate on this important bill, S. 1805, addressing the problem that should outrage many Members of this Senate and by the cosponsorship we have at this moment, I believe that is the case. That outrage should be against the abuse of our courts by those who cannot change public policy through representative government but instead are attempting an end run around the State and Federal legislatures to impose their political agenda on the people of this country through litigation. In this case, their target is the one consumer product whose access is protected by nothing less than the U.S. Constitution itself; that is, firearms.

The bill, the Protection of Lawful Commerce In Arms Act, we are talking about today and debated thoroughly yesterday and the day before, would stop what I call junk lawsuits that attempt to pin the blame and the cost of criminal misbehavior on business men and women who are following the law and selling a legal product.

This bill responds to a series of lawsuits filed primarily by municipalities advancing a variety of theories as to why gun manufacturers and sellers should be liable for the cost of injuries caused by people over whom they have no control, criminals who use firearms illegally.

This is a bipartisan bill. Let me acknowledge my Democrat sponsor, MAX BAUCUS of Montana, for his work on this initiative. Many others have helped advance it, as well as the leaders and the assistant leaders on both sides. By that demonstration, this bill is truly a bipartisan effort. The cosponsors we have to date are substantial. With myself and Senator BAUCUS included, we now have 54 cosponsors.

We introduced the bill nearly a year ago, last March, with more than half of the Senate as cosponsors at that time: Senator ALEXANDER, Senator ALLARD, Senator ALLEN, Senator BENNETT, Senator BOND, Senator BREAUX, Senator BROWNBACK, Senator BUNNING, Senator BURNS, Senator CAMPBELL, Senator CHAMBLISS, Senator COCHRAN, Senator COLEMAN, Senator COLLINS, Senator CORNYN, Senator CRAPO, Senator DOLE, Senator DOMENICI, Senator DORGAN, Senator ENSIGN, Senator ENZI, Senator GRAHAM of South Carolina, Senator GRASSLEY, Senator GREGG, Senator HAGEL, Senator HATCH, Senator HUTCHISON, Senator INHOFE, Senator JOHNSON, Senator KYL, Senator LANDRIEU, Senator LINCOLN, Senator LOTT, Senator MILLER, Senator MURKOWSKI, Senator NELSON of Nebraska, Senator NICKLES, Senator ROBERTS, Senator SANTORUM, Senator SESSIONS, Senator SHELBY, Senator SNOWE, Senator SMITH, Senator SPECTER, Senator STEVENS, Senator SUNUNU, Senator TALENT, Senator THOMAS, and Senator VOINOVICH.

This range of cosponsorship reflects extraordinarily widespread support that crosses party and geographical lines and covers the spectrum of political ideologies that is clearly always represented in the Senate. It demonstrates a strong commitment by a majority of this body to take a stand against a trend of predatory litigation that impugns the integrity of our courts, threatens a domestic industry that is critical to our Nation's defense, jeopardizes hundreds of thousands of good-paying jobs, and puts at risk access Americans have to a legal product used for hundreds of years across this Nation for lawful purposes such as recreation and defense.

We have been joined in this effort by a host of supporting organizations representing literally tens of millions of Americans from all walks of life. I thank them all for their effort to help pass the Protection of Lawful Commerce in Arms Act. I invite my colleagues to consider a broad cross section of American citizens represented by such diverse organizations as unions, including United Mine Workers of America, United Steelworkers of America, United Automobile, Aerospace and Agricultural Implement Workers of America, the locals of the International Association of Machinists and Aerospace Workers; business groups, including the U.S. Chamber of Commerce, the Alliance of America's Insurers, the National Association of Wholesale Distributors, the National Association of Manufacturers, and the American Tort Reform Association, the National Rifle Association; and more than 30 different sportsmen's groups and organizations whose members are engaged in the conservation and hunting and the shooting sports industry in all 50 States across this great Nation.

I have used the term "junk lawsuits," and I want to make it very clear, because this was part of our discussion yesterday, to anyone listening to this debate, I do not mean any disrespect to the victims of gun violence in any way who might be involved or brought into these actions by other groups.

Although their names are sometimes used in the lawsuits, they are not the people who came up with the notion of going after the industry instead of going after criminals responsible for their injuries or for their losses. The notion originated with some bureaucrats and some anti-gun advocates, and the lawyers they were with.

Victims, including their families and communities, deserve our support and our compassion, not to mention our insistence, on the aggressive enforcement of the laws that provide punishment for the criminals who have caused harm to them.

There are adequate laws out there now, and we constantly encourage our courts to go after the criminal, to lock them up, and to toss the key away when they are involved in gun violence and when they use a gun in the commission of a crime. If those laws need to be toughened, our law enforcement efforts improved, then the proper source of help is the legislatures and the governments, not the courts, and certainly not law-abiding businessmen and workers who have nothing to do with their victimization. No.

The reason there are junk lawsuits is that they do not target the responsible party for those terrible crimes. They are predatory litigation looking for a convenient deep pocket to pay for somebody else's criminal behavior. Let me repeat that. I define junk lawsuits as predatory litigation looking for a convenient deep pocket to pay for somebody else's criminal behavior.

They are junk lawsuits by any definition of the word because they are driven by political motives to hobble or bankrupt the gun industry as a way to control guns, not to control crime.

By definition, the legislation we are considering today aims to stop lawsuits that are trying to force the gun industry into paying for the crimes of people over whom they have absolutely no control.

Let me stop a minute right here and make sure everyone understands the very limited nature of this bill. I have expressed it. I have explained it. I have talked about it. I have asked all of our Members to read S. 1805.

What this bill does not do is as important as what it does. This is not a gun industry immunity bill. This bill does not create a legal shield for anyone who manufacturers or sells firearms. It does not protect members of the gun industry from every lawsuit or legal action that could be filed against them. It does not prevent them from being sued for their own misconduct.

Let me repeat that. It does not prevent them—"them," the gun industry—from being sued for their own misconduct. This bill only stops one extremely narrow category of lawsuits: lawsuits that attempt to force the gun industry to pay for the crimes of third parties over whom they have no control.

We have tried to make that limitation clear in the bill in several ways. For instance, section 2 of the bill says its No. 1 purpose is:

> To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products for the harm caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

We have also tried to make the bill's narrow purpose clear by defining the kind of lawsuit that is prohibited. Section 4 defines the one and only kind of lawsuit prohibited by this bill. Let me repeat that. Section 4 defines the one and only kind of lawsuit prohibited by this bill. Let me quote:

> a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . .

We have also tried to make the narrow scope of the bill clear by listing specific kinds of lawsuits that are not prohibited. Section 4 says they include: actions for harm resulting from defects in the firearm itself when used as intended—that is product liability suits—actions based on the negligence or negligent entrustment by the gun manufacturer, seller, or trade association; actions for breach of contract by those parties.

Furthermore, if someone has been convicted under title 18, section 924(h), in plain English, that means someone who has been convicted of transferring a firearm knowing that the gun will be used to commit a crime of violence or drug trafficking, that individual is not shielded from a civil lawsuit by someone harmed by the firearms transfer.

Finally, the bill does not protect any member of the gun industry from lawsuits for harm resulting from any illegal action they have committed. Let me repeat that. If a gun dealer, manufacturer, or trade association violates the law, this bill is not going to protect them from a lawsuit brought against them for harm resulting from that misconduct.

What I have listed for my colleagues' convenience is all spelled out in section 4 of the bill. We have been through that section several times over the last several days. Again, this is a rundown of the universe of lawsuits against members of the firearms industry that would not be stopped—I repeat, not be stopped—by this narrowly targeted bill.

What all these nonprohibited lawsuits have in common is that they involve actual misconduct or wrongful actions of some sort by a gun manufacturer, seller, or trade association. Whether you support or oppose the bill, I think we can all agree that individuals should not be shielded from the legal repercussions of their own lawless acts. The Protection of Lawful Commerce in Arms Act expressly does not provide such a shield.

I am going to repeat this again because some opponents continue to mischaracterize the bill. This is not a gun industry immunity bill. It prohibits one kind of lawsuit: a suit trying to fix the blame of a third party's criminal acts or misdeeds on the manufacturer or seller of the firearm used in that crime.

Even though this is a narrowly focused bill, it is an extremely important bill. The junk lawsuits we are addressing today would reverse a longstanding legal principle in this country that manufacturers of products are not responsible for the criminal—I repeat, the criminal—misuse of their products.

You do not have to be a lawyer to know that runaway juries and activist judges can turn common sense on its head in specific cases, setting precedents that have had dramatic repercussions. The potential repercussions here could be devastating.

If a gun manufacturer is held liable for the harm done by a criminal for misusing a gun, then there is nothing to stop the manufacturers of any products used in crimes from having to bear the cost of those crimes. Since when is this country going to step to that level? So automobile manufacturers will have to take the blame for the death of a bystander who gets in the way of a drunk driver? Yes, there are some who would suggest that. The local hardware store will be held responsible for a kitchen knife it sold that was later used in the crime of rape? A baseball team, whose bat was used to bludgeon a victim, will have to pay for the cost of that crime?

Now, does that sound silly to the average listener? It may. But those kinds of charges are being brought today because this country does not want to hold its criminal element accountable, in many instances.

It is not just unfair to hold law-abiding businesses and workers responsible for criminal misconduct with the products they make and sell, but it would also bring havoc to our marketplaces.

Hold on to your wallets, America, because those businesses that don't actually go into bankruptcy will have to pass their costs through to the consumer. My guess is that many in the anti-gun community would say: That is just fine; if we cannot bankrupt the business, then let's price the product out of the range of the average law-abiding citizen who would like to afford a gun. To the criminal element that probably steals for a living, they may have the kind of funds to buy that gun in the black market at any price, and oftentimes they do.

Even without being successful, this litigation imposes enormous financial burdens on the gun industry. It is important to keep in mind that the deep pocket of the gun industry isn't all that deep. In hearings on the House side, experts testified that the firearms industry, taken together—I mean put them all together, look at their assets, their income—would not collectively equal one Fortune 500 company.

Last year it was estimated—and we can only estimate because the costs of litigation are confidential business information—that these baseless lawsuits have cost the firearms industry more than $100 million. Furthermore, don't think these companies can just pass the costs off to their insurer because in nearly every case, insurance carriers have denied coverage.

I quote from what a Massachusetts union had to say about the issue, the union whose members work at the Savage Arms Company in Westfield, MA:

> Today, we have 160 members from Savage workforce. By comparison, about a dozen years ago, we had over 500 Savage workers who were members of our Local. . . .

Savage Arms is not alone. Other businesses have closed their doors, and the jobs have not been lost because of the sheer cost, the jobs have been lost because of the sheer cost of fighting these junk lawsuits.

The impact on innocent workers and communities is not the only potential repercussion of these lawsuits. If U.S. firearms manufacturers close their doors, where will our military and peace officers have to go to obtain their guns? Do we then have to start a government gun manufacturing company? I doubt that the efficiencies and the qualities and the costs would be the same. Surely we don't want foreign suppliers to control our national defense and community law enforcement, not to mention the ability of individual American citizens to exercise their second amendment protected rights through accessing firearms for self-defense, recreation, and other lawful purposes.

For all these reasons, more than 30 States have laws on the books offering some protection for the gun industry from these extraordinary suits. Support has steadily grown in Congress for taking action at the Federal level. This would not be the first time Congress had acted to prevent this kind of threat to industries. Some would suggest it is unprecedented, it has never happened before.

Let me give an example. There are a number of Members in this Chamber who were serving when the Congress passed the General Aviation Revitalization Act barring product liability suits against manufacturers of planes that were more than 18 years old. Just a couple of years ago, in the Homeland Security Act, Congress placed limits on the liability of a half a dozen industries, including manufacturers of smallpox vaccine and sellers of antiterrorist technologies. These are only a couple examples out of a significant list of Federal tort reform measures that have been enacted over the years when Congress perceived a need to protect a specific sector of our economy or defense interests from burdensome, unfair, and/or frivolous litigation.

I could go on. I have said enough for the moment. My colleagues are here. Senator REED, who is handling the opposition, has statements to make. I believe Senator LEVIN has an amendment he would like to offer. But clearly, this is an issue whose time has come. It is time to step out and say: We are not going to suggest to law-abiding citizens that you ought to bear the brunt of the criminal action. That is not the case. Law-abiding citizens already bear a substantial amount of that brunt. Taxpayers usually pick up most of the bills in these tragic instances. That is why enforcing the law, putting those who misuse firearms behind bars, is what it really ought to be all about.

But for social purposes, for political purposes, for whatever reason that the anti-gun community has not been able to legislate either on the floor of the Senate, on the floor of the House, or in State legislatures across the Nation, they now run to the court system.

We suggest they can't do that, nor should they do that. We want to protect the victims. We certainly want to protect them from the criminal element. Much legislation is talked about now for the victim and victims' rights. I support all of those kinds of things. But why should the law-abiding manufacturer of any product in this country, that is quality but simply misused and that misuse takes the life of a third party—why should that manufacturer be responsible? We already have a broad range of areas in which that responsibility is described and in which the consumer is protected if that responsibility is not followed by the manufacturer or those who sell that product in the marketplace. That is an arena that is well litigated today. That is an arena in tort law that is well spelled out.

Here today and in past lawsuits, we have had great imagination that tries to cook up the issue of negligence or to redefine it or shape it in a way that Americans have said and that tort law has said for centuries: You shall not go there; you cannot go there.

Judges are saying that today and have said it consistently in these kinds of lawsuits. That doesn't stop the lawsuits from coming. That does not stop these lawsuits from draining hundreds of millions of dollars out of a law-abiding, responsible commercial and manufacturer entities.

I reserve the remainder of my time and yield the floor.

The PRESIDING OFFICER (Mrs. DOLE). The Senator from Rhode Island.

Mr. REED. Madam President, the legislation before us can't be all things. It can't be an effective barrier against litigation to protect the gun industry and yet a way to protect the legitimate rights of citizens who have been harmed by guns.

In fact, it is not both; it is one of them. It is carefully, cleverly worded legislation to immunize the gun industry—dealers, manufacturers, and the National Rifle Association—from any type of liability with respect to guns, virtually.

There are perhaps minor exceptions, but the cases we see before us today—the case of the DC snipers, the case of two police officers in New Jersey—would be barred. These cases have already been filed. In fact, one of the sweeping aspects of this legislation is, it doesn't attempt to set the rules prospectively, to say as we go forward these cases would not be heard by the courts. It literally walks in and tells people who have filed cases, cases that have survived summary judgment motions already by State court judges: You are out of court.

This is sweeping, and it is unprecedented. It deals a serious blow to citizens throughout this country while enhancing dramatically the legal protections for the gun industry.

Consistently the proponents say: You can't hold someone responsible for the criminal actions of another. That is not what these cases are about. These cases suggest, declare, allege that an individual failed in his or her duties, his or her responsibility to do what is necessary, responsibility in the conduct of their activity—in the case of gun dealers, to take sensible, reasonable precautions, the standard of care that a business person would use, the standard of care that any business person must use in the United States.

The allegation is they fail to do that. The evidence is overwhelming there was no standard of adequate care. Here is a gun dealer who could not account for 238 weapons, who claims a teenager—he didn't realize it at the time—must have walked in and shoplifted an automatic weapon, a sniper weapon, and carried it away undetected. In fact, this weapon was missing without his knowledge for weeks and months, undetermined.

Is that the standard of care we would expect a businessperson to exercise, particularly one who deals in products that can kill? I don't think so. That is what this is about. This is not about punishing people for the criminal activity of others. It is about holding individuals up to a standard of conduct we expect from anyone. There are various examples. Some say, my God, if the hardware store sells a knife to somebody and it is used in a crime, they are not responsible. If you have a car dealer who leaves the keys in the cars and has no security, and a teenager takes that car and gets into an accident and harms someone, certainly I think the parents of the individuals harmed or that individual could legitimately go to court and say this dealer didn't meet the rational standard of care of anybody in the automobile industry. They have to secure these cars. You cannot make them available to people and teenagers who might steal them. That is common sense.

That would apply to the automobile dealer, but if this legislation passes, common sense doesn't apply to the gun industry in this country. In fact, this is really a license for irresponsibility we are considering today. As I said before, when they get the Federal firearms license, if this bill passes, you can get another license. You are being irresponsible. That is not to suggest all dealers are irresponsible, but many are.

We talk about junk lawsuits. It is not a junk lawsuit when your husband has been shot while sitting in the bus waiting to go to work. I don't think the Johnson family volunteered to be part of this social experiment. I think any suggestion to that effect is offensive. They have been harmed grievously. A wife has lost her husband; children have lost their father. Their livelihoods are in question. They seek redress, as anyone would. That is not a junk suit. That is someone who says I have been harmed by the negligence of someone and that person should pay.

The suggestion that this suit is in response to some avalanche of lawsuits that is devastating the firearm manufacturers is without any foundation. The industry is so stressed they have raised $100 million to protect themselves, not just legally, but also in terms of controlling the documents and communications between themselves and their attorneys. This is not an industry that seems to be without resources. But I can tell you many of the families of victims of the Washington snipers are looking forward to a lifetime where they might have the resources to send children to college and do the things they would have been able to do if their spouse was still alive. The industry, it has been suggested, is being pushed into bankruptcy because of these frivolous junk lawsuits.

Well, Savage Arms was mentioned. It is a company that was founded in 1894. It has provided firearms for now over a century. It went bankrupt in 1988 because, according to the CEO, Ron

Coburn: "We had too many products, each of them in dire need of re-engineering."

There is no suggestion they were being intimidated by these fancy political science lawsuits. Under the bankruptcy plan, Coburn reduced the product line and fired 400 employees. There has been contraction in this industry, as in every manufacturing industry, but it is not as a result of these suits.

Since that time, Savage has done remarkably well. They have taken the lead in many different aspects. They are a responsible company. They were honored as manufacturer of the year and in many other aspects. It has been suggested this company, in effect, is overwhelmed by these lawsuits. I don't think that is the case. I think they make business judgments as any business—based upon products, demand, and all these things.

We are not facing a situation where we would be without the benefit of gun manufacturers in the United States because of these lawsuits. The suggestion that this somehow would interfere with our national security is outlandish. The suggestion we would then have to turn to foreign suppliers for our military is rather odd. Indeed, today, many of the suppliers for our national defense are the subsidiaries of foreign companies. Browning, Winchester and Fabrique Nationale, which supplies M-16 A-4 assault rifles and the M-2 49G squad automatic weapon, are subsidiaries of Herstal, a Belgium firm. The Pentagon contracted with Heckler and Koch, a German firm, to help develop the next generation of industry weapons.

Clearly, the Pentagon doesn't feel American manufacturers are so distressed that they have to go overseas. They are going overseas because they are looking for superior weapons. They are dealing with American subsidiaries of foreign companies. This is not about preserving the defense and the ability to access weapons. This is about protecting one industry from the legal responsibility to exercise caution any individual must exercise—one industry, when all industries must do that, or indeed the vast majority. This is not about protecting the integrity of the courts. What does it say to the integrity of the courts of West Virginia when a judge already found that a suit involving these two New Jersey police officers should proceed, when we say, no, you are wrong, this case is out the door? This is not about protecting courts. It is about protecting an industry.

We have been asked to look closely at the law. We have to look closely at the law in terms of the cases we know are pending because, frankly, we could hypothesize about cases in the future. This is the law:

A qualified civil liability action may not be brought in any Federal or State court.

That is not a particularly narrow excerpt. It is not a listing of those exemptions the gun industry made available themselves. This is broad and sweeping, barring the doors of these types of suits. In addition to that—talking about overreaching, dismissal of pending actions—it is rare indeed that this Congress could go in and tell plaintiffs who have a case in progress you are out the door, you cannot proceed. This is extraordinary, to me.

A qualified civil liability action that is pending on the date of enactment of this act shall be immediately dismissed by the court.

Not reviewed but dismissed. I think, again, that is extraordinarily broad and sweeping. The real aspect of this legislation goes to the definition on the next chart.

A qualified civil liability action means a civil action brought by any person against a manufacturer or a seller of a qualified product or trade association, for damages resulting from the criminal or unlawful misuse of the qualified product by the person or a third party, but shall not include—

So it is any action, again not narrowly constrained, carefully worded legislation.

Then there are several exemptions. Let me point out, if this were a narrowly crafted piece of legislation, the exemption I think should apply to the gun industry, not to the litigants. It should be those safe harbors where if they do certain things, they are protected, if they exercise due care. That is the way we want to draft narrowly worded legislation. And this is quite to the contrary.

The burden is now on the individual to show that they qualify to bring their case to court, not on the companies to show that their case is somehow outside the normal range of negligent actions.

The key provision, in terms of the sniper case—and I will talk about the sniper case in a moment—is sections ii and iii. Madam President, ii is "actions brought against a seller for "negligent entrustment" or "negligence per se."

Negligent entrustment is a defined term in the legislation. It means:

. . . the supplying of a qualified product by a seller for use by another person when the seller knows, or should know, the person to whom the product is supplied to is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

The key element is "know." For example, in the sniper case, the dealer claims he did not know that the weapon was missing. It has been acknowledged by the sniper that the weapon was shoplifted. This theory will not provide that case to go forward.

"Negligence per se," again, is an element of knowledge which does not seem to exist within the facts as we know them about the Bull's Eye situation. By the way, it has been abrogated as a theory of law in Washington State which would be an appropriate forum for the trial, or at least for consideration. That doesn't work.

The next section is actions in which a manufacturer or seller of a qualified product who violated a State or Federal statute and, quite importantly, that violation was a proximate cause of the harm.

In the case of the sniper shootings, literally it would have to be shown that the individual gun dealer at Bull's Eye knew the particular weapon was missing more than 48 hours before he was confronted by the ATF and that he failed to report it and, as a result, the sniper using that weapon inflicted the harm. But, of course, the facts suggest otherwise. The weapon was shoplifted. The individual claimed he did not know it was missing at all.

All of these carefully worded exceptions do not provide relief for individual plaintiffs. They do not provide it for the plaintiffs in the case of the snipers. They do not provide relief in the case of the two police officers in New Jersey. Yesterday, we had an opportunity to correct that, just a small correction that would allow for these situations, and we failed to do that.

This legislation is designed with one purpose: to immunize the gun industry. I think it is unfortunate, it is unprecedented, and it leads to the conclusion that we are essentially encouraging the kind of reckless behavior, the kind of irresponsible behavior which is not the norm, but it is certainly present and, indeed, it is present in the context that firearms pose a particular danger to the community.

We talked about Bull's Eye Shooter Supply in Tacoma, WA, over 238 weapons missing. You are not supposed to have any weapons missing.

Then there are the situations, for example, of Buckner Enterprises, Pro Guns and Sporting Goods, D&D Discount, Hock Shop, Julie's Pawn, Kent Arms, Northwest Shooters, Woodstove Supply, and Steve's Guns and Archery, all in Michigan.

Over a 4-month period, an undercover State trooper and a 20-year-old convicted felon traveled to 14 firearms retailers and attempted to make a straw purchase. The eight stores I mentioned above agreed to make the straw deal—irresponsible and reckless and, under this legislation, perhaps invulnerable to a suit by someone who might have been hurt as a result of the potential straw sales.

Bob's Gunshop, Bristol, PA, repeatedly sold firearms to convicted felons and out-of-State residents, including a 9 mm Taurus sold to a New Jersey convicted felon. The owners of the store counseled criminals and out-of-State residents to find a local resident to complete the background check.

Is that irresponsible? Yes. Is that against the law? Perhaps not.

It goes on and on. One gun store with which I am intrigued is Illinois Gun Works in Chicago, IL. John "No Nose" DiFronzo, a reputed mobster, owns the property where Illinois Gun works is located. Illinois Gun Works is one of the leading suppliers of crime guns to local criminals. This is from the Chicago Sun Times.

There are gun dealers out there who are acting irresponsibly and negligently. They will escape liability if this legislation passes. There are manufacturers that are not policing the

States, because of our silence, have felt it necessary to speak up to protect law-abiding citizens from this misuse of our courts.

Yesterday, opponents repeatedly charged that negligent businesses and people would be let off the hook by this bill. It was even stated that this bill would bar virtually all negligence and product liability cases in States and Federal courts. I repeat, nothing can be further from the truth. For those who come to this floor to make that charge, my challenge to them is to read the bill. Obviously they have not. They are simply following the script of the anti-gun community of this Nation. That is not fair to Senators on this floor to be allowed to believe what this legislation simply does not do nor does it say.

The bill affirmatively allows lawsuits brought against the gun industry when they have been negligent. The bill affirmatively allows product liability action. Any manufacturer, distributor, or dealer who knowingly violates any State or Federal law can be held civilly liable under the bill. This bill does not shut the courthouse door.

Under S. 397, plaintiffs will have the opportunity to argue that their case falls under the exception, such as violations of Federal and State law, negligent entrustment, knowingly transferring to a dangerous person. That is what that all means, that you have knowingly sold a firearm to a person who cannot legally have it or who you have reason to believe could use it for a purpose other than intended. That all comes under the current definition of Federal law.

Breach of contract or the warranty or the manufacture or sale of a defective product—these are all well-accepted legal principles, and they are protected by this bill. Current cases where a manufacturer, distributor, or dealer knowingly violates a State or Federal law will not be thrown out.

Opponents have complained about the Senate considering this bill at the same time and even have impugned the motives of the Senators who support it. The votes yesterday speak for themselves. Sixty-six Senators said it is time we got this bill before the Senate, and that is where we are today. When a supermajority of the Senate speaks, there is no question that the Senate moves, as it should, in that direction. The Senate could not muster the votes needed to invoke cloture on the Defense authorization bill which would have moved us to a final vote on that measure possibly by tonight. But the Senate, as I have said, by a wide margin spoke yesterday to the importance of dealing with this issue. Sixty-six Senators said let's deal with it now, and I have just sent to the desk 61 signatures of the cosponsors of this bill that demonstrate broad bipartisan support.

I think it is appropriate to consider all of this in the context of the Defense authorization bill because the reckless lawsuits we are seeking to stop are aimed at businesses that supply our soldiers, our sailors, and our airmen with their firepower. Stop and think about it. Would there ever be a day when all of our military would be armed with weapons manufactured in a foreign nation? There are many in this country, in driving or attempting to drive our firearm manufacturers from this country, who would have it that way.

Clearly, it is within the appropriate context as we deal with Defense authorization that we ought to be talking about the credibility and the assurance we are able to sustain the firearm manufacturing industry in this country. In fact, the United States is the only major world power that does not have a firearm factory of its own. That is something that simply ought not be tolerated. Thirty-eight of our colleagues of both parties signed on to a letter to Majority Leader FRIST making this very point: the importance of protecting America's small firearms industries against reckless lawsuits.

I would read from that letter, but I see that my colleague from Oklahoma is now on the floor wishing to discuss this legislation.

Mr. President, I yield the floor in recognition of Senator COBURN.

The PRESIDING OFFICER (Mr. ALEXANDER). The Senator from Oklahoma.

Mr. COBURN. Mr. President, first, I thank the Senator from Idaho for his unwavering faithfulness to the Constitution and upholding his oath as a Senator, as a Member of this body.

The Bill of Rights is important to us, and I rise today in support of that Bill of Rights and, in particular, the second amendment. Not only do I believe the right to bear arms is guaranteed by the U.S. Constitution, I exercise that right personally as a gun owner. I stand on behalf of the people of Oklahoma who adamantly believe in the second amendment and the right to carry arms and against the attack on that right by the frivolous lawsuits that have come about of late.

We have seen many attempts to curtail the second amendment. Nearly a decade ago anti-gun activists tried to limit the right of law-abiding citizens under the banner of "terrorism" legislation by slipping in anti-gun provisions.

In another line of attack, the anti-gun lobby responded to decreasing enthusiasm for limiting handguns by promoting a new form of gun control—a cosmetic ban on guns labeled with the inflammatory title "assault weapons." While that ban expired in 2004, we will likely see Members of this body attempt to add a renewal and expansion of that ban on this bill today.

Now anti-gun activists have found another way to constrict the right to bear arms and attack the Bill of Rights and attack the Constitution, and that is through frivolous litigation. They have not succeeded in jailing thousands of law-abiding Americans for having guns, or making the registration and purchase process so onerous that nobody bothers to buy a gun. They have failed to get their cosmetic weapons ban renewed. So now they must attack the arms industry financially through lawsuits—frivolous lawsuits, I might say.

This is why we are here today—to put a stop to the unmeritorious litigation that threatens to bankrupt a vital industry in this country.

As an important aside, I strongly believe it is important that we not write legislation that provides immunity for an industry that knowingly harms consumers.

It is also important that those who commit crimes, with or without the use of firearms, should be punished for their actions. I have always been a strong supporter of tough crime legislation. However, make no mistake, the lawsuits that will be prohibited under this legislation are intended to drive the gun industry out of business. With no gun industry, there is no second amendment right because there is no supply.

These lawsuits against gun manufacturers and sellers are not directed at perpetrators of crime. Instead, they are part of a stealth effort to limit gun ownership, and I oppose any such effort adamantly.

Anti-gun activists have failed to advance their agenda at the ballot box. They failed to advance their agenda in the legislatures. Therefore, they are hoping these cases will be brought before sympathetic activist judges—activist judges—who will determine by judicial flat that the arms industry is responsible for the action of third parties.

Additionally, trial lawyers are working hand in glove with the anti-gun activists because they see the next litigation cash cow, the next cause of action that will create a fortune for them in legal fees.

As a result of some of the efforts of the anti-gun activists and some trial lawyers, the gun manufacturing and sales industry face huge costs that arise from simply defending unjustified lawsuits, not to mention the potential of runaway verdicts. This small industry has already experienced over $200 million in such charges. Even one large verdict could bankrupt an entire industry.

Since 1988, individuals and municipalities have filed dozens of novel lawsuits against members of the firearms industry. These suits are not intended to create a solution. They are intended to drive the gun industry out of business by holding manufacturers and dealers liable for the intentional and criminal act of third parties over whom they have absolutely no control.

In testimony before a House subcommittee in 2005, the general counsel of the National Shooting Sports Foundation, Inc., said:

> I believe a conservative estimate of the total, industry-wide cost of defending ourselves to date now exceeds $200 million.

What does that produce in our country other than waste and abnormal enrichment of the legal system?

This is a huge sum for a small industry such as the gun industry. The firearms industry taken together would not equal the value of a Fortune 500 company.

The danger that these lawsuits could destroy the gun industry is especially threatening because our national security and our civil liberties are at stake.

First, the gun industry manufactures firearms for America's military forces and law enforcement agencies, the 9, the 11. Due in part to Federal purchasing rules these guns are made in the U.S. by American workers. Successful lawsuits could leave the U.S. at the mercy of small foreign suppliers.

Second, by restricting the gun industry's ability to make and sell guns and ammunition, the lawsuits threaten the ability of Americans to exercise their second amendment right to bear arms.

Finally, if the firearms industry must continue to spend millions of dollars on litigation or eventually goes bankrupt, thousands of people will lose their jobs. Secondary suppliers to gunmakers will also have suffered and will continue to suffer.

This is why it is not surprising that the labor unions, representing workers at major firearms plants, such as the International Association of Machinists and Aerospace Workers in East Alton, IL, support this bill. This union's business representatives stated that the jobs of their 2,850 union members "would disappear if trial lawyers and opportunistic politicians get their way."

The economic impact of this problem may be felt in other ways. In my home State of Oklahoma, hunting and fishing creates an enormous economic impact. It is tremendously positive. Hunters bring in retail sales of over $292 million per year; 6,755 jobs in Oklahoma are dependent on hunting; $137,122,000 in salaries and wages in Oklahoma alone; and $22 million in State sales tax per year. The financial insolvency of gun manufacturers and sellers would have a devastating effect on my State and many other States similar to Oklahoma.

Insurance rates for firearm manufacturers have skyrocketed since these suits began, and some manufacturers are already being denied insurance and seeing their policies canceled, leaving them unprotected and vulnerable to bankruptcy.

That is the ultimate goal of these suits—bankruptcy and the elimination of this arms industry. Because of that, 33 State legislatures have acted to block similar lawsuits, either by limiting the power of localities to file suit or by amending State product liability laws. However, it only takes one lawsuit in one State to bankrupt the entire industry, making all of those State laws inconsequential. That is why it is essential that we pass Federal legislation.

Additionally, plaintiffs in these suits demand enormous monetary damages and a broad variety of injunctive relief relating to the design, the manufacture, the distribution, the marketing, and the sale of firearms.

Some of their demands: One-gun-a-month purchase restrictions not required by State laws; requiring manufacturers and distributors to "participate in a court-ordered study of lawful demand for firearms and to cease sales in excess of lawful demand; "prohibition on sales to dealers who are not stocking dealers with at least $250,000 of inventory—in other words, we are going to regulate how much you have to have in inventory before you can be a gun seller; a permanent injunction requiring the addition of a safety feature for handguns that will prevent their discharge by "those who steal handguns"; and a prohibition on the sales of guns near Chicago that by their design are unreasonably attractive to criminals.

These lawsuits are frivolous. Anti-gun activists want to blame violent acts of third parties on manufacturers of guns for simply manufacturing guns and sellers of guns for simply selling them. This doesn't make any sense. This would be the equivalent of holding a car dealer responsible for a person who intentionally runs down a pedestrian simply because the car that was sold by the dealer was used by a third party to commit negligent homicide.

Guns, like many other things, can be dangerous in the wrong hands. The manufacturer or seller of a gun who is not negligent and obeys all applicable laws should not be held accountable for the unforeseeable actions of a third party. This is a country based on personal accountability, and when we start muddying that aspect of our law and culture we will see all sorts of unintended consequences.

Most of the victims of gun injuries I have seen in the emergency room as a practicing physician were people who were intentionally shot by other people. The gun was the mechanism that was used, but it was the individual who carried out that act. The gun was a tool. Should we ban all tools that are capable of committing homicide or committing injury? These people were not injured by defective guns or defective ammunition. The individuals who shot these patients deserve aggressive prosecution, not the industry that made the guns or the legal sellers of the guns. Even when I treated individuals who injured themselves with guns, these tragedies were accidents. It was not part of a quality or product defect. It was an act of stupidity on the part of people. Part of our freedom comes with the ability to make wise choices. If we limit our ability to make choices, then we limit our freedom.

These lawsuits are part of an anti-gun activist effort to make an end run around the legislative system. We have seen that in multiple areas in our country. When you can't pass it in the legislature, you get an activist judge to get done what you wanted to do in the first place, even though a majority of Americans and a majority of legislatures don't want it. But one judge decides for the rest of us.

We are coming up on a judicial nomination for the Supreme Court. One of the questions that has to be asked is what is the proposal, What is the role in terms of judges making law rather than interpreting law? It will be a key question.

So far judges have not been convinced by their arguments. Here are a few examples. The Louisiana Supreme Court struck down the right of New Orleans to bring a suit in the face of a State law forbidding it, in an opinion stating clearly:

> This lawsuit constitutes an indirect attempt to regulate the lawful design, manufacture, marketing and sale of firearms.

Judge Berle M. Schiller of the U.S. District Court for the Eastern District of Pennsylvania struck the nail on the head when dismissing all of Philadelphia's allegations, stating that "the city's action seeks to control the gun industry by litigation, an end the city could not accomplish by passing such an ordnance."

The Delaware Superior Court adeptly stated that "the Court sees no duty on the manufacturer's part that goes beyond their duties with respect to design and manufacture. The Court cannot imagine that a weapon can be designed that operates for law-abiding people but not for criminals."

A word of caution. Most new tort ideas took a while to work. All it would take is one multimillion-dollar lawsuit to severely damage this industry. This bill is limited in scope. It protects only licensed and law-abiding firearms and ammunition manufacturers and sellers from lawsuits that seek to hold manufacturers and sellers responsible for the crime that third party criminals commit with their nondefective products.

Manufacturers and sellers are still responsible for their own negligent or criminal conduct and must operate entirely within the Federal and State laws.

Firearms and ammunition manufacturers or sellers may be held liable for negligent entrustment or negligence per se; violation of a State or Federal statute applicable to the sale or marketing of the product where the violation was the proximate cause of the harm for which relief is sought; breach of contract or warranty; and product defect. They still are responsible for all that through this bill. It takes none of that away. It holds personal accountability solid and steadfast. It does not infringe on it. Claimants may still go to court to argue that their claims fall under one of the exceptions.

In my opinion, gun manufacturers and sellers are already policed enough, too much, through hundreds of pages of

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 109th CONGRESS, FIRST SESSION

Vol. 151 WASHINGTON, WEDNESDAY, JULY 27, 2005 No. 104—Book II

Senate

PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

The PRESIDING OFFICER. The Senate will now proceed to the consideration of S. 397, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 397) to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.

The PRESIDING OFFICER. The majority leader.

CLOTURE MOTION

Mr. FRIST. Mr. President, yesterday, as everyone knows, we invoked cloture on the motion to proceed to this underlying legislation with a vote of 66 to 32. Although we are now proceeding to the substance of the bill, it has been made clear that the bill will be subjected to a filibuster. While we respect a Senator's right to debate this liability, it is apparent that a cloture vote will be needed to ultimately bring this very bipartisan bill to a final vote. For that reason, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close, debate on the motion to proceed to Calendar No. 15, S. 397: A bill to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.

Bill Frist, George Allen, Larry E. Craig, Craig Thomas, Michael B. Enzi, Jeff Sessions, Kit Bond, Lamar Alexander, Mitch McConnell, Sam Brownback, Tom Coburn, Richard Burr, John McCain, Richard Shelby, Saxby Chambliss, John Ensign, Chuck Hagel.

Mr. FRIST. Mr. President, this vote can technically ripen as early as 1 a.m., not tomorrow but the next day, Friday morning. I am not certain at this point if we will vote then or later that morning. I will continue and want to continue to consult with my colleagues on the schedule.

As we just discussed on the Senate floor, we have a lot of business to accomplish over the next several days. We have the energy conference report, the highway conference report, the Interior bill, the veterans health money attached, a number of nominations. Therefore, I hope that when cloture is invoked, we can find a way to bring this bill to a final vote so that we can expedite some of these other very important issues.

AMENDMENT NO. 1605

Having said that, I now send an amendment to the desk and ask for its consideration.

The PRESIDING OFFICER. The clerk will report the amendment.

The legislative clerk read as follows:

The Senator from Tennessee [Mr. FRIST], for Mr. CRAIG, proposes an amendment numbered 1605.

Mr. FRIST. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To amend the exceptions)

On page 10, line 5, strike "or" and all that follows through line 16 and insert the following:

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

Mr. FRIST. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

AMENDMENT NO. 1606 TO AMENDMENT NO. 1605

Mr. FRIST. I now send a second-degree amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Tennessee [Mr. FRIST] proposes an amendment numbered 1606 to amendment No. 1605.

Mr. FRIST. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

Mr. KENNEDY. I object.

The PRESIDING OFFICER. Objection is heard. The clerk will read the amendment.

The legislative clerk read as follows:

(Purpose: To make clear that the bill does not apply to actions commenced by the Attorney General to enforce the Gun Control Act and National Firearms Act)

At the end, insert the following:

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18, United States Code, or chapter 53 of the Internal Revenue Code of 1986.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, the actions that have just taken place have put us on S. 397, the Protection of Lawful Commerce in Arms Act. Earlier this morning, I submitted for the RECORD some now 67 cosponsors, which demonstrates that this bill is clearly very bipartisan legislation, supported by a Republican and Democrat majority in the Senate.

The actions the leader has just taken to file cloture would allow the cloture motion to ripen by as early as 1 a.m. Friday morning. Amendments have just been filed by the leader, and we will begin the process of debate on this important legislation.

With that in mind, if this bill and this debate seem familiar to any of us,

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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it should, because the Senate debated a very similar measure a little over a year ago. At that time, we had a full debate over a number of days. It is worth noting that the Senate defeated every amendment addressing the actual substance of the bill. However, opponents succeeded in attaching a couple of unrelated poison-pill amendments that ultimately caused the bill to fail.

The need for this legislation is very real. Over the course of yesterday and today, some of us have expressed what we believe is the urgency of this legislation. The Protection of Lawful Commerce in Arms Act would stop junk lawsuits that attempt to pin the blame and the cost of criminal behavior on businesspeople who are following the law and selling a legal product. In fact, the one consumer product where access is protected by nothing less than our Constitution itself is our firearms, and that is exactly what is at stake today: the right of law-abiding American consumers, American citizens, to have access to a robust and productive marketplace in the effective manufacturing and sale of firearms.

This bill responds to a series of lawsuits filed primarily by municipalities to shift the financial burden for criminal violence onto the law-abiding business community. These suits are based on a variety of legal theories. We heard some of them expressed by opposition to this bill earlier in the day seeking to hold gun manufacturers and sellers liable for the cost of injuries caused by people over whom they have no control—criminals who choose to use firearms illegally.

This is a bipartisan bill, as I mentioned. Let me acknowledge my primary Democrat sponsor, Senator MAX BAUCUS of Montana, and thank him for his work on this initiative. Senator BAUCUS and I introduced this bill in February, and more than half of the Senate, both Republicans and Democrats, have now joined us since it was formally introduced in its final form.

Earlier in the day, I inserted into the RECORD all of those who are now cosponsors. This range of cosponsorship reflects extraordinary, widespread support that crosses party and demographic lines and covers the spectrum of political ideologies represented in the Senate. It demonstrates a strong commitment by a majority of this body to take a stand against a trend toward predatory litigation that impugns the integrity of our courts, threatens a domestic industry that is critical to our national defense, jeopardizes hundreds of thousands of good-paying jobs of hard-working men and women across America, and puts at risk the access Americans have to a legal product used for hundreds of years across the Nation for lawful purposes such as recreation and, most important, self-defense.

I have used the term "junk lawsuits," and I wish to make very clear to everyone listening to this debate that I do not mean any disrespect in any way whatsoever to the victims of gun violence who might be involved in these actions. Although their names are sometimes used in these lawsuits, they are not the people who came up with the notion of going after the industry instead of going after the criminals responsible for the injuries or the loss of life of their loved ones. That notion originated with bureaucrats, anti-gun advocates and the lawyers who work with them.

Victims, including their families and communities, deserve our support and compassion, not to mention our insistence on an aggressive law enforcement effort that puts punishment where it ought to be rendered—to the criminal.

In the nearly 6 years of the Bush administration, death by guns and crime in which guns were used in the commission of that crime have plummeted. Why? Because this Justice Department has gone after the criminal and not the law-abiding citizen.

It is the criminal who acts illegally. It is the criminal who ought to be prosecuted. But somehow, some who are involved in this movement have a tremendously distorted idea that the person who produces a legal product and sells that legal product somehow is responsible because they just should have known that product might fall into the hands of a criminal and might cost someone their life.

If those laws need to be toughened or if law enforcement efforts need to be improved, then the proper source of help is legislators and governments to ensure the tightening of the laws and not the courts and certainly not law-abiding businesses or workers who had nothing to do with those who were victimized by the criminal element of this country.

No. These junk lawsuits do not target the responsible party in those terrible crimes. This is predatory legislation, looking for a convenient deep pocket to pay for somebody else's criminal behavior, and by every definition it therefore deserves to be called a junk lawsuit. If one wants to stand on the floor and defend that kind of action in the courts of America, so be it. I believe in the democratic process. But Americans get it, they clearly understand it, and so do Senators, and that is why now 67 Senators support this legislation. These are junk lawsuits because they are driven for political motives to hobble or bankrupt the gun industry as a way of controlling guns.

For decades, anti-gunners have come to the Senate floor or the House with one scheme or one idea after another, and the American people, based on what they believe strongly to be their constitutional rights, have rejected this. Now the anti-gun community attempts once again to come through the back door of the Congress by going in through the front door of the courthouse. It simply has not worked, and it will not work.

But there is another motive in mind. By definition, the legislation we are considering today aims to stop lawsuits that are trying to force the gun industry to pay for the crimes of people over whom they have no control.

I used an analogy last year. I will use it again today. It is like saying to GM, General Motors, or any car manufacturer that because somebody buys their car and gets drunk and gets in that car and kills someone out on the road, gee whiz, they should have known that a drunk would drive that car, and therefore they should never have produced it, and therefore they are liable. For years, I have always understood that there are some in our society who say no one is responsible for their action, no one should be held responsible for their action, and that is an underlying core of the debate we are talking about or the issue we are talking about today.

Let me stop a minute and make sure everyone understands the limited nature of the bill. Some will argue it differently, but I would argue those who argue it differently are trying to expand the definition of what we believe to be very clear within the legislation. What this bill does not do is as important as what it does do. This is not a gun industry immunity bill. I think I have already heard that said since the clock tolled 12 noon. This bill does not create a legal shield for anybody who manufactures or sells a firearm. It does not protect members of the gun industry from every lawsuit or legal action that could be filed against them. It does not prevent them from being sued for their own misconduct.

This bill only stops one extremely narrow category of lawsuits, lawsuits that attempt to force the gun industry to pay for the crimes of third parties over whom they have no control. We have tried to make that limitation as clear as we possibly can and in several ways. For instance, section 2(b) of the bill says its No. 1 purpose is:

> to prohibit causes of action against manufacturers, distributors, dealers and importers of firearms or ammunition products and their trade associations for the harm solely caused by the criminal or unlawful use or misuse of firearms products or ammunition products by others when the product functions as designed and intended.

We have also tried to make the bill's narrow purpose clear by defining the kind of lawsuit that is prohibited. Section 5 defines the one and only kind of action prohibited by this bill as follows:

> [A] . . . civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. . . .

We have also tried to make the narrow scope of the bill clear by listing specific kinds of lawsuits that are not prohibited. Section 5 says they include actions for harm resulting from defects

EXHIBIT B

STATE OF WISCONSIN:CIRCUIT COURT:MILWAUKEE COUNTY:

BRANCH 30

BRYAN NORBERG, et al.,

Plaintiffs, CASE NO. 10-CV-20655

-vs-

BADGER GUNS, INC., et al.,

Defendants.

ORAL RULING

BEFORE THE HONORABLE JEFFREY CONEN,
CIRCUIT COURT JUDGE PRESIDING
JANUARY 30, 2014.

APPEARANCES:

BRETT ECKSTEIN, Attorney at Law, appeared on behalf of the Plaintiffs.

PATRICK DUNPHY and JON LOWY, Attorneys at Law, appeared telephonically.

JAMES VOGTS, Attorney at Law, appeared on behalf of the Defendants, Badger Guns, Inc., Badger Outdoor, Inc., Walter Allan, Adam Allan, and Milton Beatovic.

(APPEARANCES CONT.)

MARY NELSON, Attorney at Law, appeared on behalf of the Defendants, Milton Beatovic on the merits only.

PHILLIP REID, Attorney at Law, appeared on behalf of West Bend Mutual Insurance Company.

ALLEN RATKOWSKI, Attorney at Law, appeared on behalf of Metropolitan Insurance and Metropolitan Group.

JESSICA M. ROTH
Court Reporter

TRANSCRIPT OF PROCEEDINGS

THE CLERK: Case number 10-CV-20655. Bryan Norberg, et al., vs. Badger Guns, et al. Appearances.

MR. ECKSTEIN: Attorney Brett Eckstein from the law firm of Cannon & Dunphy appears in person. And on behalf of plaintiffs, attorneys Patrick Dunphy and Jon Lowy appearing by telephone. Good morning, Your Honor.

THE COURT: Good morning.

MR. VOGTS: James Vogts on behalf of the defendants Badger Guns, Badger Outdoors, Milton Beatovic, Walter Allan, and Adam Allan.

MS. NELSON: Good morning, Judge. Mary Nelson on behalf of Mr. Beatovic on the merits.

THE COURT: Okay.

MR. REID: Phillip Reid for West Bend.

MR. RATKOWSKI: Good morning. Allen Ratkowski with Piper & Schmidt, for Metropolitan.

THE COURT: All right. Good morning. We've had some significant arguments on this case with regard to the summary judgment

motions involving the claims that have been brought up. In reviewing what's gone on here, the Court has finally come to a decision, it's not been an easy one; but it is a quite complicated set of circumstances that we're dealing with. And that is part of the reason why the Court took as much time as it did to get this matter to a decision. And because there were a number of issues and this wasn't a slam-dunk case in either direction, as we learned from going back and forth at the hearing, it was very well argued and it was very vociferously argued.

So my initial thoughts were to go through some of the factual issues in this case, and I don't think that we need to do that. I think everyone knows what the general factual issues are. And any reviewing Court can figure them out as time goes along because this is not a terribly complicated set of circumstances when it comes to the facts. So why don't we basically start with where this matter started and that is the defendants in this case. And the defendants are Badger Guns Incorporated which is a federally licensed firearms dealer that has been conducting or had been conducting business in west Milwaukee

for a period of time. Badger Outdoors, Inc. which was also a federally license firearm dealer in west Milwaukee that did business for a significant period of time. Adam Allan who is the shareholder, sole shareholder of Badger Guns, Inc. and a long time employee of Badger Outdoors entity. Walter Allan who's a shareholder of Badger Outdoors and an employee of Badger Guns at the time the gun was sold. And then Milton Beatovic who was also a shareholder of Badger Outdoors until he retired in 2007 and was living outside of the State at the time of the sale.

The plaintiffs have alleged several causes of action against all the defendants or the defendants in this case. And I'll go through those briefly, and then we'll take them one at a time since that's how they were originally argued and it makes the most sense to proceed in that manner.

First of all, there's count one and was a count of negligence with regard to all of the defendants, Badger Guns, Badger Outdoors, Adam Allan, Walter Allan and Milton Beatovic. Count two was a claim of negligent entrustment as to all of the defendants. Count three -- strike that --

Count six, because I think some of these counts were eventually dismissed out, correct? Judge Cooper dismissed out some of the counts, so I think it's count six which is the civil conspiracy claim against all the defendants. Count seven is aiding and abetting. And then count nine is something we'll talk about in the end and that is a claim for piercing the corporate veil. And that's with regard to the principals of the two corporations, that would be Adam Allan with regard to Badger Guns, Walter Allan and Milton Beatovic with regard to Badger Outdoors.

So now that we have all the players set, even though everyone knows who they are at least for the record, we can go through where we're going on this. Count one is claim of negligence that was brought against all the parties. The issue that was brought up at the motion was whether the defendants are immune from the plaintiffs' negligence claims pursuant to the protection of lawful commerce in Arms Act which will be known as PLCAA. And especially with regard to section 7903(5)(a)(3) which involves a qualified civil liability action immunity, the PLCAA immunizes gun manufacturers and sellers against civil actions

for damages or equitable relief. Plaintiffs' negligence action fits the basic definition of a qualified civil liability action under 7903(5)(a). This is because the plaintiffs' claim is a civil action, was brought against a seller, Badger Guns, who deals as a qualified -- in a qualified product which is a firearm.

Additionally, the plaintiffs sue for damages resulting from Mr. Burton, who was the third-party purchaser in this case, for the alleged straw purchase for his unlawful misuse of a gun. There are six exceptions to the general rule listed in the statutes. The important exception is 7903(5)(a)(3). Which has come to be known as a predicate exception because plaintiffs not only must present a cognizable claim, but he or she must also allege a knowing violation of a predicate statute. Exception applies if a seller of a qualified product violates a state or federal statute applicable to the sale or marketing of the product. And the violation was approximate cause of the harm for which relief was sought and that is set forth in the statute.

In this case, plaintiffs' negligence action fits the predicate exception, section 7903

(5)(a)(3). Plaintiffs allege that Badger Guns sold Collins, that's Jacob Collins, who is the ultimate person who discharged the firearm. Using words here that may be of -- in dispute later on because the Court will rule as to what the meaning of those are, but at least it's clear that he discharged the firearm. Plaintiffs' allege that Badger Guns sold Mr. Collins the firearm by knowingly helping Collins to complete a fraudulent ATF form, that's 4473, in violation of the Gun Control Act of 18 U.S.C.A 922(m).

Defendants really don't dispute this allegation -- Actually, I think I have something wrong. It was Mr. Burton who was the actual shooter, I believe. Defendants cite certain cases from other jurisdictions and from federal jurisdictions to support their position that they are immune from suit as a matter of law under the PLCAA. And I'll go through each of those and discuss my thoughts with regard to those and how they apply in this case. None of those cases are binding upon this Court, but are here for guidance for the Court to see how other jurisdictions have handled this matter.

The first matter that we're looking at is Ileto

v. Glock, which is at 565 F. 3d 1126, 9th Circuit opinion from 2009. And in that case, a person named Bufford Furrow shot and injured three young children and shot and killed Joseph Ileto, a postal worker. The shooting victims and Ileto's surviving wife filed an action against the manufacturers, marketers, importers, distributors, and sellers of the firearms, alleging that the entities intentionally produced, marketed, distributed, and sold more firearms than the legitimate market demanded in order to take advantage of resales to distributors, and that they knew or should have known or should have known would in turn be sold to illegal buyers. Plaintiffs did not allege that the defendant violated any statute. Instead, this plaintiff solely sued under the California's codified tort statutes. Ninth Circuit looked at whether the California tort statutes were applicable to the sale or marketing of firearms under 7903(5)(a)(3). The Court rejected the plaintiffs' claim that California's public nuisance statutes could be a predicate statute that were encompassed under PLCAA's third exception. After reviewing the statutory language and history of the PLCAA, the

Court held that plaintiff's California tort claims were preempted.

In looking through Ileto, it is not really analogous to what's gone on in this particular case. The plaintiffs in this case have alleged a knowing violation of 18 U.S.C.A 922(m) which qualifies as the predicate offense under section 7903(5)(a)(3), the PLCAA. Additionally, the plaintiffs have alleged a negligence cause of action which is a separate cognizable claim that is founded on the predicate offense. The problem in Ileto was that the California tort statutes were determined not to be applicable to the sale of marketing of firearms and, therefore, the claims were dismissed because there was no predicate offense. Here, there's clearly a pled predicate offense that is the foundation for the negligence action.

The second case is out of Alaska, it's in the Estate of Kim ex rel. Alexander v. Coxe, C-O-X-E. And in that case, Jason Cody entered Rayco Sales, a gun shop in Juneau, Alaska, with the intention of buying a .22 rifle. The sale's clerk described Cody as someone who had been living in the woods but did not detect that he was on drugs, or

alcohol, or that he posed any danger. After looking at some rifles priced at around $195, Cody indicated that he would have to think about whether to purchase a rifle for a few minutes. Cody then wondered around the store, thinking that -- that Cody was no longer interested in the rifle, the sales clerk went to the back of the store to attend to other issues. When the sales clerk returned, Cody was gone and there was $200 on the counter of the store, and one of the rifles was missing. Rifle was reported stolen two days later, Cody shot and killed a man.

Murdered individual's estate brought a wrongful death action against Coxe, alleging that Coxe negligently or illegally provided Cody with the rifle. The Alaska Supreme Court held that a stolen gun would mean that the Estate's claim was precluded by the PLCAA because there could not have been a knowing violation of the statute by the gun shop under 7903(5)(a)(3). Additionally, the Court held that material issues of fact were present as to whether the murderer stole the gun or whether Rayco was illegally selling or had illegally sold the rifle.

The Estate of Kim cite is 295 P.3d at 380 at --

an Alaska case from 2013. The facts in the Estate of Kim are different than what we're looking at here. In Kim, there was an issue of fact as to whether the murderer stole the gun from Rayco Sales. A stolen gun would preclude plaintiffs from showing that there was a knowing violation of the firearms statute by the gun dealer.

In this case, the plaintiffs clearly allege knowing violations of the Gun Control Act, and there's no issues of whether Collins stole the gun or not. It's quite clear that it was purchased.

The next case that has been cited was Bannerman v. Mountain State Pawn, Inc., a Northern District of West Virginia case. The cite is a WL cite, so it's 2010 WL 9103469. In that case, the plaintiffs were in a bar in West Virginia when a person entered and began randomly shooting. The bartender was killed and several patrons were injured. About one year prior to the shooting, Mountain State Pawn sold a Hi-Point Luger .9 mm semiautomatic handgun to Mr. Jones who was the shooter in that matter, either knowing, failing, or refusing to discover that he was a convicted felon. Jones was convicted six years prior to the shooting in a robbery conviction. The handgun

that Jones used in the bar was the same handgun that he purchased from the pawn shop. Plaintiffs brought suit against the defendant in the United States District Court for the Northern District of West Virginia, alleging a violation of section 922(d)(1); the violation of which was the proximate cause of the plaintiff's injuries. The defendant pawn shop moved to dismiss the plaintiffs' complaint for failure to state a claim. Mountain State Pawn asserted that 922(d)(1) did not provide a private cause of action, and that the PLCAA protected it from the pending action brought by the plaintiffs. The District Court concluded that plaintiffs alleged knowing violation of 922(d)(1), which qualifies as a predicate offense, but that 922(d)(1) did not create a private cause of action. This means that plaintiff failed to state a cause of action upon which relief could be granted. The Court finished by noting that a predicate exception under the PLCAA does not, by itself, provide for a private right allowing plaintiff to impose civil liability on the pawn shop. As a result, the State -- or the Court granted Mountain State's motion to dismiss.

Bannerman is somewhat similar to this case, in that a predicate offense was stated. The difference and the problem in Bannerman was the plaintiffs attempted to use 922(d)(1) as their total cause of action. In Badger Guns, the alleged knowing violation of the Gun Control Act is a predicate offense that supports a separate negligence cause of action. In this case, negligence was pled.

There has been a recent case in New York, Williams v. Beemiller, Inc., which has a cite of 952 N.Y.S. 2d at 333, a 2012 case. This appears to be more analogous to the situation that we're looking at now. In that case, an injured student and his father alleged that a license firearm dealer sold 87 guns, including the weapon used to shoot the student, to a gun trafficker in a transaction in Ohio. The New York Court division allowed a civil suit against a manufacturer, distributor, and dealer to proceed under the predicate exception. In that case, the plaintiffs alleged cause of action for negligence, negligent entrustment, negligence per se, public nuisance, intentional violations of federal, state, and local law. The Court held that the claims were

not barred by the PLCAA because the plaintiffs had sufficiently alleged facts to support a finding that the defendants knowingly violated the federal Gun Control Act. The complaint in Williams did not specify which statutory violations the defendants knowingly violated, but mere facts supporting the violation was enough for the Court of Appeals to allow the action to move along.

In the situation in Williams, it's similar to what's going on in this case. Like Williams, Badger Guns involved a straw sale of a firearm. Badger alleged knowing violations of the Gun Control Act which qualifies for the predicate exception. Badger Guns also alleged negligence like the plaintiff did in Williams. For these reasons, Badger Guns is most similar to the Williams case and qualifies for the predicate exception to the PLCAA 7903(5)(a)(3).

Two of the other cases that were cited, Jeffries v. District of Columbia at 2013 WL 76266, a 2013 case, and Gilland v. Sportsmen's Outpost, 2011 WL 2479693 from Connecticut, are really not applicable in this matter. The Jeffries suit involved a suit against a gun manufacturer, and there's really no detailed facts that supported

the illegal sale. And Gilland is an unpublished decision that had to do with stolen firearms. So those don't really apply. And, again, they're not necessary to be used for precedential value in this case. So, at this point, with regard to Badger Guns, the Court is going to deny the motion for summary judgment with regard to Badger Guns in the negligence case.

The next issue is whether count one can stand as to Badger Outdoors, Walter Allan, Adam Allan and Milton Beatovic. As to Badger Outdoors, the defense has been that it is not the corporate entity that sold Mr. Collins the gun, and that there is no legal basis to find Badger Outdoors negligent for the act it did not commit. Plaintiffs responded by stating that Badger Outdoors acted negligently in the years leading up to the sale that made it possible for Collins, including creating negligent business practices. This is a factual dispute that goes directly to whether Badger Outdoors was negligent. And because there is an issue of fact here, right now, to determine exactly what went on and how they may have been intertwined, the Court is going to deny the motion for summary judgment with regard to

Badger Outdoors.

As regard to Walter Allan, Adam Allan, and Milton Beatovic, the defense had argued that there is no factual basis that they were involved in the sale of the gun to Mr. Collins and cannot be liable in the negligence claim. Defense also argues that these individuals were shareholders of Badger Outdoors and Badger Guns and cannot be liable for corporate debts.

This is where it gets a little bit hairy because we have two separate ways to go when we talk about the corporations. The first way is piercing the corporate veil which we'll talk about at the very end as to where that goes and how we get there, if we even do. And the second part of it goes to corporate immunity. So we'll talk a little bit about the corporate immunity right now.

In Wisconsin, there has been almost unwavering adherence to shareholder nonliability, the law is quite clear. Exceptions to the principle are not to be applied lightly, and limited liability is held to be the rule in most cases. However, an individual is personally responsible for his own tortious conduct. The Supreme Court in Oxmans' Erwin Meat v. Blacketer at 86 Wis. 2d 683, 1979

case. Corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity. If he's shown to have been acting for the corporation, the corporation may also be liable but the individual is not relieved of its own responsibility. The Supreme Court recently stated in a case that actually came back here, a case that I have, and that's the Casper case. That the Court declined to hold that corporate officers may never be personally liable for negligent acts committed in the scope of their corporate duties.

In this case, it's unclear whether a jury would find Badger Guns, Walter Allan, Adam Allan, Milton Beatovic liable for the tort of negligence. In most cases of shareholder liability, there's a judgment against the corporation, so liability has already been established. Then the issue becomes the piercing the corporate veil remedy, which is an equitable remedy. Here, I'm not sure, at this time, whether any of the defendants will be held liable. This is merely a gatekeeping function for proceeding onto further matters in this case. So liability is still an issue of fact in this case.

And it's too early to know whether the corporate shareholder immunity will even need to be applied because there's been no jury verdict on liability. So the motion for summary judgment as to Walter Allan, Adam Allan, and Milton Beatovic, with regard to the negligence claim, is denied. There are material issues of fact that exist as to whether they were negligent in their own right.

Defendants now argue with regard -- Let's talk next about the negligent entrustment. The defendants argue that the statutory definition of negligent entrustment, that under the statutory definition, the person to whom Badger Guns supplied the firearm, which is Mr. Collins, was not the person, Mr. Burton, who thereafter used the firearm to harm the plaintiffs. The defendant's motion on this claim is based on statutory construction.

The plaintiffs argue that the defendant's interpretation of negligent entrustment is not in accord with the case law because the defendants think that, use, in the statutory definition means, discharge. The goal of statutory interpretation is to discern and give effect to the intent of the legislature. It's long standing

law here in the State of Wisconsin. Statutory interpretation begins with the language of the statute and if the meaning there is plain, the inquiry ends. There are three situations in which the Court looks outside the statutes. First, if the meaning of a statute is ambiguous after considering all intrinsic sources. The Court will look to extrinsic sources such as legislative history to find legislative intent. Second, if the meaning of the statute is plain, the Court sometimes looks to legislative history to confirm the plain meaning. And, third, that if the meaning of the statute appears to be plain, that the meaning produces absurd results, the Court may also consult legislative history.

Here, the PLCAA defines negligent entrustment as the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others. Neither party really cites any case law that interprets the PLCAA's meaning of, use, in section 7903(5)(b). According to the Webster's

Ninth New Collegiate Dictionary, the term, use, means to put into action or service. Avail oneself of employ or to put or bring into action or service. And that's according to the dictionary.

The Court does not believe that congress used the word, use, to mean exclusively discharge as the defendant suggests. In (5) of 7903, (5)(a), the statute uses the word, discharge. In section 15 U.S.C.A 7903(5)(b), congress chose to employ the term, use, not, discharge. When the word, use, is construed in the context of the rest of the statute, it is broader than, discharge. One can certainly construe the phrase of, use -- or the phrase, use, of a firearm in a manner that involves unreasonable risk of injury to others, to meaning brandishing a gun in a public place, or giving a gun to a minor who cannot legally own a gun in exchange for money. Congress knew the difference between, discharge, and, use, and did not intend to use them interchangeably. And, therefore, the defendant's motion to dismiss count two for negligent entrustment against Badger Guns is denied.

The next issue is whether Badger Outdoors, Adam

Allan, Walter Allan, and Milton Beatovic can be liable for negligent entrustment. Here, the arguments are the same as in count one. And that's basically the argument that none of the entities or individuals sold Collins the gun and none of them are sellers as defined in 7903(6). As noted in count one, there are material issues of fact present as to whether defendants conspired with one another to engage in negligent conduct. Also, the defendant's assertion that Badger Outdoors, Adam Allan, Walter Allan, and Milton Beatovic are not sellers, does not support the defendant's argument. Because if they're truly not sellers, then they are not protected by the PLCAA. So defendant's motion to dismiss count two for negligent entrustment against Badger Outdoors, Adam Allan, Walter Allan, and Milton Beatovic is denied.

Civil conspiracy. In Wisconsin, a civil conspiracy has been defined by a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means, some purpose not in itself unlawful. Set forth in Mendelson v. Blatz Brewing, 9 Wis. 2d 847, 1960 case.

In Wisconsin, there's no such thing as a separate civil action for conspiracy. There is an action for damages caused by acts pursuant to a conspiracy, but none of the -- not for the conspiracy alone. In a civil action for damages for an executed conspiracy, the gist of the action is the damages. The gravamen of a civil action for damages resulting from an alleged conspiracy is not conspiracy itself, but rather the civil wrong which has been committed pursuant to the conspiracy and which results in damage to the plaintiff. And that's all coming from the Onderdonk v. Lamb case, 79 Wis. 2d 241, a 1977 case which discusses a civil conspiracy in detail. The resultant damages in a civil conspiracy action must necessarily result from overt acts, whether or not these overt acts in themselves are unlawful. To state a cause of action for civil conspiracy, the complaint must allege the formation, operation of the conspiracy, the wrong act or acts done pursuant thereto, and then the damages resulting from those acts. And that, again, comes from the Onderdonk case.

Defendants argue that they could not have conspired to act negligently, and this case is

similar to a Kansas appellate court decision, Shirley v. Glass, at 241 P. 3d at 134, a Kansas appellate decision from 2010. The Shirley case does not represent the law in Wisconsin because Wisconsin Supreme Court has stated that Wisconsin rejects the rule that for a cause of action for conspiracy to lie, there must be underlying conduct which in itself be -- which would in itself be actionable. The defendants tried to bar the civil conspiracy claim as a matter of law. It appears that there are material issues of fact as to whether the defendants formed and operated a conspiracy to maintain unlawful sales practices at Badger Guns after ATF threatened to revoke Badger Outdoors federal firearms license, that the unlawful sale to Collins was the civil wrong pursuant to the conspiracy; and that the plaintiffs' injuries were the foreseeable result. These are all issues of fact, and these are all jury issues.

Defendants next contend that there is no evidence that Adam Allan, Walter Allan, or Milton Beatovic entered into an agreement with Badger Guns to sell the firearms -- firearm in question to Mr. Collins. To support this argument, they

cite Winslow v. Brown, 1985 Court of Appeals decision from Wisconsin at 125 Wis. 2d 327. This case was cited for the proposition that the mere knowledge, acquiescence, or approval of a plan without cooperation or agreement to cooperate is not enough to make a person a party to a conspiracy. The Court is --

THE CLERK: Is someone hitting a button? This is the clerk. Is someone hitting a button on their phone?

THE COURT: Are we okay?

THE CLERK: I guess so. I don't know what that was.

THE COURT: The Court does not believe that Winslow requires that the object of a conspiracy be a specific target or individual. Winslow does not preclude plaintiffs' conspiracy claims as a matter of law. Here, a jury could reasonably conclude that the common end of the conspiracy was a continued illegal sale of weapons to dangerous people.

Defendants' last argument is that the intra-corporate conspiracy doctrine precludes Adam Allan from liability on the conspiracy claim as a matter of law. The intracorporate conspiracy

doctrine is set forth in Copperweld Corporation v. Independence Tube, U.S. Supreme Court case at 467 U.S. 752. And it's based on unity of interest between a parent company and a wholly-owned subsidiary. Wisconsin, in Brew City Redevelopment v. Ferchill, F-E-R-C-H-I-L-L, Group at 279 Wis. 2d 606 also discusses this issue. Copperweld involved a lawsuit for conspiracy to violate the Sherman Antitrust Act under 15 U.S.C.(1), against a company and its wholly owned subsidiary. The Supreme Court held that because of the complete unity of interest between the parent corporation, the wholly-owned subsidiary, the corporation cannot conspire together for purposes of anti-trust law. This doctrine does nothing to preclude the conspiracy claim in this case because the conspiracy is alleged between Walter Allan, Milton Beatovic, Adam Allan, Badger Guns, and Badger Outdoors. These individuals are obviously not corporate subsidiaries. So the motion for summary judgment with regard to count six for conspiracy is, a matter of fact, to be determined by the jury and the motion is denied.

Aiding and abetting. A person is liable in tort for aiding and abetting if the person, first,

undertakes conduct as a matter of objective facts -- strike that -- undertakes conduct, that as a matter of objective fact, aids another in the commission of an unlawful act. And, number two, they consciously desire or intend that the conduct will yield the assistance. This is set forth in Tensfeldt, T-E-N-S-F-E-L-D-T, v. Haberman, H-A-B-E-R-M-A-N, a Wisconsin case from 2009, at 319 Wis. 2d 329.

Defendants argue that there's no evidence that they aided and abetted the sale of the firearm to Collins. They contend that Donald Flora sold the gun to Collins, and that none of the defendants were present for the sale, nor did the defendants provide any assistance to Flora and his decision to sell the firearm to Collins. However, the plaintiffs contend that all the defendants aided Badger Guns in maintaining its negligent and unlawful sales by transferring Badger Outdoors inventory to Adam Allan for no money down, facilitating the operation of Badger Guns, and continuing Badger Guns with the same employees and utilizing the same unlawful sales practices.

This dispute is very fact intensive and should not be resolved on summary judgment. And the

Court will not dismiss this count as a matter of law, so the motion for summary judgment in aiding and abetting, at this time, is denied.

Piercing the corporate veil. Go through my analysis and then I'm going to have some questions of counsel with regard to piercing the corporate veil because there's some practical issues that really need to be discussed.

Defendants argue that there's no basis to pierce the corporate veil to make defendants personally liable. The plaintiffs argue that Adam Allan had complete domination over Badger Guns, they never held any annual meetings, he ignored corporate formalities in 2009 when the gun was sold. In sum, the plaintiffs argue that Adam Allan used Badger Guns to commit a fraud when he created the business climate that allowed Badger Guns to sell the crime gun to Mr. Collins.

Piercing the corporate veil is an adequate -- strike that -- is an equitable remedy in Wisconsin and that is quite well known. The Court will disregard the corporate entity and attach liability to shareholders in the following instance; where the corporation's affairs are organized, controlled, and conducted so that the

corporation has no separate existence of its own and is the mere instrumentality of the shareholders, and the corporate form is used to evade an obligation to gain an unjust advantage or commit an injustice.

At this stage of the litigation, it's not clear whether Badger Guns committed any fraud in order to sell the guns illegally. This is a factual issue that's still in dispute. And piercing the corporate veil is really not something that we need to take a look at now.

Having said all of this, let me just give a little bit of my own, even though this is all my own, but off the cuff commentary of where we're going on this, and then I have a couple of questions for the lawyers. First of all, this is not the end all to end all, this is just the gatekeeping phase to determine whether there are issues that need to be determined by a trier of fact in this matter. This is not, in any way, a stamp of approval for the plaintiffs' case. And the Court believes that there's enough issues to go forward and that is really the extent of it. There may very well be findings by the finder of fact which is going to a jury in September, that

the plaintiff has not met its burden. It may happen, it may not. I don't know. But there are factual issues which really prevent me from deciding this case on affidavits. And the Court believes, at that point, that we need to go forward. Also, the Court made certain legal decisions with regard to some of the statutes and those are obviously quite clear.

Having said all of that, the one thing that still continues to bother me, is what do we do with the piercing the corporate veil? Piercing the corporate veil -- this is my take on it and I want to get your input -- piercing the corporate veil, my understanding, is basically an equitable remedy that goes to the collection of a judgment, in the long run. And that is, if there's liability found on behalf of the corporation, that, at some point, there has to be a hearing for a determination of whether you can go beyond the corporation to collect that judgment. It doesn't go, in and of itself, to the liability of the shareholder in terms of personal liability. This differs from the discussion that I had before about shareholder immunity, which is looking at the same issue from the opposite end. Shareholder

immunity is a different story. Piercing the corporate veil, my take on this, is that it is a collection means if liability is ever found. We will start with you, Mr. Eckstein, do you agree with me?

MR. ECKSTEIN: I do agree with you. And as I indicated at the last hearing, the reason the claim was pled as it was is because there's no consistent answer in case law as to whether the claim has to be made now or for it to be barred. But I agree with you, the case law is defined as an equitable remedy following a judgment.

THE COURT: All right.

MR. ECKSTEIN: And we're not there.

THE COURT: Mr. Vogts?

MR. VOGTS: I agree, Your Honor, that's something to take up, you know, after a judgment, if any, has been entered.

THE COURT: Right. And my concern about this, obviously, is what the verdict is going to look like, and I don't want it to be any more messy than it already is. And I don't think that a jury makes that decision, and I don't think a jury should even have to deal with any of those issues. I think, that if there is liability

that's found on -- against Badger Guns, Inc., that we then go to a mini-trial to the Court. And the Court would, at that time, determine if the corporate veil should be pierced or not.

MR. VOGTS: I agree with that, Your Honor.

THE COURT: Okay. So we're clear --

MR. ECKSTEIN: Sounds good to me.

THE COURT: We're clear that that cause of action, even though was pled in terms of maintaining jurisdiction, is really now being put on the side?

MR. ECKSTEIN: That's accurate.

THE COURT: All right. As I said before, this has now opened the door for trial issues. I do not usually change my mind on summary judgment rulings. However, just so the record is clear, because I had a case a couple weeks ago that involved motions after verdict which may involve some legal rulings based on certain things that came to light, certain factual issues that came to light at trial. That doesn't mean that this is 100 percent the end of these issues, and it can be brought up again in light of

some of the factual issues that are proven at trial for the Court to reassess. And I'm not necessarily saying that that's going to be the case. I just want the record to be quite clear that, you know, this is just the first phase. There is always -- Then there's a fact finding case that comes up and that's the trail issue. And then in cases such as this, which are very -- not only fact intensive but legal intensive, that there may be all kinds of legal wrangling at the end when the verdict comes down, whatever the verdict may be.

So having said that, I just want to make -- I know the lawyers are quite clear, but I'm basically speaking to Mr. Detrick (phonetic), in terms of having everyone understand where we're going in this case, in this set of circumstances. All right. So having said that, let's go off the record for a second.

(A discussion was held off the record.)

THE COURT: All right. Let's go back on the record. The discussions that we had off the record really involved scheduling in the future, so we have a number of new dates. So,

Lisa, can you help me out?

THE CLERK: July 28th for motions in limine and final pretrial --

MR. ECKSTEIN: 29th.

THE CLERK: 29th. I'm sorry. At 9:00 a.m.

THE COURT: Okay. And then there's a March 10th?

THE CLERK: March 10th was set previously.

THE COURT: March 10th was previously set for the coverage issue. The Court will also do a final pretrial on the July dates, so any pretrial reports need to be filed in advance of that. Any motions in limine that have not already been filed, should be filed 45 days in advance of the hearing date, and responses to be filed 20 days in advance of the hearing date, that goes both ways. I think that that should cover all of our scheduling issues right now. Very good. Thank you.

* * * *

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

I, JESSICA M. ROTH, Court Reporter in and for the Circuit Court of Milwaukee County, do hereby certify that the foregoing is a true and correct transcript of all the proceedings had in the above-entitled matter as the same are contained in my original machine shorthand notes on the said trial or proceedings.

Dated at Milwaukee, Wisconsin on March 4, 2014.

_____
JESSICA M. ROTH
OFFICIAL COURT REPORTER

EXHIBIT C

JOINT
STANDING
COMMITTEE
HEARINGS

GENERAL LAW
PART 4
913-1227

1979

LOIS BRYANT: I'm Lois Bryant from the Department of Consumer Protection testifying on behalf of Mary Heslin of D.C.P., for Raised Committee Bill No. 7813. This bill provides an amendment to Section 19422 of Chapter 357. The amendment will simply clarify the statutory authority for the collection of license fees. Consumer Protection's position in support of this bill is based upon the existing practice of licensing manufacturers, renovators, supply dealers and second-hand dealers of bedding and upholstered furniture.

In the recent past, a question has arisen concerning the statutory mandate to obtain a license since Chapter 357 of the General Statutes was transferred to the Department of Consumer Protection from the Labor Department in 1972 Consumer Protection has been administering both the statutes and regulations formally within the Labor Department's jurisdiction. To obviate any further question as to the General Assembly's expressed mandate concerning the requirement for possession of licenses, the Department urges the adoption of legislation such as Raised Committee Bill No. 7813.

REP. GRANDE: This is more or less a housecleaning bill, right?

LOIS BRYANT: Basically, yes. It just makes it clear, right.

REP. GRANDE: Arnold Feigen.

ARNOLD FEIGEN: Mr. Chairman, members of the committee, my name is Arnold Feigen. I'm an Assistant Attorney General in the Consumer Protection Unit of the Attorney General's Office. I'm here to speak in support of Raised Committee Bill No. 7810, on behalf of Commissioner Mary Heslin and Attorney General Carl Ajello.

The Raised Committee Bill is a bill which seeks to make various technical amendments to the existing Connecticut Unfair Trade Practices Act. In essence, it's a housecleaning bill. Section 1A of the proposed bill deletes reference to the phrase "such seller or lessor in the private section of the Connecticut Unfair Trade Practices Act". The deletion will correct an ambiguity which now exists by virtue of a 1975 amendment to the Connecticut Unfair Trade Practices Act. Simply stated, such seller or lessor has no antecedent in the statute. The amendment will now allow a suit by any person who suffers any ascertainable loss of money or property. Numerous arguments have been raised in both state and federal courts that the plaintiff, in order to sue, must be a purchaser or a lessee of a seller or

ARNOLD FEIGEN (Continued): lessor. Clarification of Section 42-110GA is essential in order to avoid needless litigation of the particular phrase now found in the statute.

Section 1C simply places the burden upon the attorney of the plaintiff to send a copy of the complaint filed in court to the Attorney General. Clerks of the court simply do not or are not instructed to comply with Section 42-110GC. The comparable provision in the Connecticut Anti-Trust Act has worked quite well. That section places the burden of notification upon attorney for the plaintiff and you can see Section 35-37 of the General Statutes where it's found in the Connecticut Anti-Trust Act.

Section 1D clarifies an ambiguity which presently exists in the wording of Section 42-110GD, in Section 42-110GA. Subsection D can be read to permit injunctive relief only if damages have been awarded, although Subsection A appears to permit precisely the opposite result. The amendment contained in Section 1D will avoid difficulties by clarifying the language contained in Section 42-110GD by the inclusion of the language "or in lieu of damages".

Section 1E will correct an oversight in the 1975 amendment to the Connecticut Unfair Trade Practices Act. The Attorney General now has the authority under Section 42-110M to sue in Superior Court. The authority of the Attorney General is an alternative remedy available to the state. At present, only final orders contained in an administrative proceeding may be used by private litigants as prima facie evidence in a suit under Section 42-110GA.

Section 1E will apply this prima facie evidence provision to actions brought directly by the Attorney General on behalf of the Commissioner of Consumer Protection in Superior Court. It sould be noted that almost all actions by the State of Connecticut under the Connecticut Unfair Trade Practices Act are brought by the Attorney General under Section 42-110M.

The final change which the proposed bill seeks to make is Section 2B -- Section 2B merely conforms the class action notice provision under Section 42-110I with notice provision under Section 42-110H. Since only the Attorney General may appear in court, it is only logical that the Attorney General receive notice of the suit. Thank you.

REP. GRANDE: Arnold, would you leave a copy of your testimony with us?

ARNOLD FEIGEN: I could have it -- ah, I could have it sent to you. I could have it copied -- unless you...

REP. GRANDE: And would you rewrite it in clearer language? (Laughter).

ARNOLD FEIGEN: When would the committee like to have that by?

REP. GRANDE: Maybe in a couple of days. I'm sure a couple of days will be enough time. Thank you.

Just a brief summary and stay with trying to use clear language, okay...(laughter).

ARNOLD FEIGEN: Clear language, huh? Thank you very much, sir.

REP. GRANDE: Edward Connole.

EDWARD CONNOLE: Good morning. My name is Edward Connole. I represent the International Brotherhood of Police Officers, Hartford Police, Local 308. I'm here to speak on Raised Committee Bill No. 1516.

At present, the Connecticut General Statute, Section 30-45 prohibits police officers from obtaining employment from individuals and organizations operating on a liquor permit granted by the State of Connecticut. This prohibits police officers from not just tending bar or working in a package store, but from working for a distributor of liquor, either in a warehouse operation or in a matter of delivering on their service trucks. It also limits the individuals who have other members of their families in many other business, it eliminates them from being of any assistance to them and it limits, in the case of some veteran officers from planning on a second career, possibly in their own business or working for someone else who has a liquor permit. We find it justifiable that we ask if police officers in this state can work in these establishments. We find no basis for the law originally. We tried to find some history on it and it was extremely difficult to find out why it was included. I just ask that this be passed by this committee and by the House and by the Senate.

SEN. CUTILLO: This bill is the way you want it to take effect?

EDWARD CONNOLE: Yeah, this bill is written much more properly now, sir. Yes.

EXHIBIT D

S-145

CONNECTICUT
GEN. ASSEMBLY
SENATE

PROCEEDINGS
1979

VOL. 22
PART 8
2897-2748

Substitute for Senate Bill 431, An Act Concerning Discrimination Against The Mentally Ill. (As amended by Senate Amendment "A").

THE CHAIR:

We are on page 11 of the calendar, bottom of the page, an item that had been passed temporarily, calendar No. 608.

SENATOR DEPIANO:

Mr. President, I was going to defer that to Senator Curry who acknowledged that he wanted to be the one to present that bill and speak on it.

THE CHAIR:

Senator Barry.

SENATOR BARRY:

Mr. President, may that bill be passed retaining at Senator Curry's request?

THE CHAIR:

Motion is to pass the item retaining its place. Is there objection? Hearing none, it is so ordered.

THE CLERK:

Turning to page 13 of the calendar, top item on the page, calendar 624, Files 302 and 611, Favorable Report of the Joint Standing Committee on General Law, House Bill 7810, An Act Concerning Unfair Trade Practices. (As amended by House Amendment Schedule "A").

SENATOR CASEY:

Mr. President.

THE CHAIR:

Senator Casey.

SENATOR CASEY:

I move acceptance of the joint committee's favorable report and passage of the bill.

THE CHAIR:

Question's on acceptance and passage as amended by House Amendment Schedule "A". Will you remark, Senator?

SENATOR CASEY:

Thank you, Sir. The bill was amended in the House and it includes an issue, a venue, that is where the law suit may be brought. It changes the bill from placing the cite (?) of the action in the judicial district of the defendent's place of business or residence to the place of business or residence of the plaintiff or the defendent, and this is on line 31. The bill in general would promote greater cooperation between public and private efforts to enforce the uniform trade practices act. The Attorney General's office is hampered in this enforcement effort by limited staff. Private litigation under this act is essential and the proposal would ease the burden on priviate individuals and thus encourage private litigation. If there are no objections to this bill, I move for consent calendar, Mr. President.

THE CHAIR:

Question on the bill. Motion is to place the item on

consent. Is there objection to the motion? Hearing neither, it is so ordered. The item is placed on the consent calendar.

THE CLERK:

Turning to page 36 of the calendar, under the heading Unfavorable Reports, calendar 545, Senate Petition No. 56, File 531, Unfavorable Report of the Joint Standing Committee on the Environment. Substitute for Senate Bill 163, An Act Prohibiting the Use of Steel Jawed Traps.

THE CHAIR:

We are on page 36 of the calendar, calendar 545, an item that is properly before us as a favorable report. Senator Skelley.

SENATOR SKELLEY:

Mr. President, I would ask at this time that this bill be P.R.'d 'til Tuesday, please, retaining its place on the calendar in hope that further and additional conversations could result in a equitable compromise.

THE CHAIR:

Motion is to pass retain this item until a further date. Objection to the motion? Hearing none, it is so ordered.

THE CLERK:

Clerk will turn to page 37 of the calendar, calendar 704, Senate Petition No. 58, File 730. Unfavorable Report of the Joint Standing Committee on Human Services, Senate Bill 618, An Act Providing For Additional Correctional Facilities.